



BROOKLYN ARENA LOCAL DEVELOPMENT CORPORATION

MEETING OF THE DIRECTORS

at the New York City Offices of
Empire State Development
633 Third Avenue - 37th Floor Conference Room
New York, New York 10017

TUESDAY
April 10, 2018 – 10:00 AM

AGENDA

I. CORPORATE ACTIONS

- A. Adoption of the Annual Report in accordance with the New York State Not-For-Profit Corporation Law and Appointment of Corporate Officers – Authorization to Adopt the Annual Report; Appoint Corporate Officers; and Take Related Actions
- B. Procurement Guidelines – Authorization to Adopt Revised Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts
- C. Delegation of Authority to Enter into Contracts – Delegation of Authority to Sign Contracts Not to Exceed \$100,000
- D. Pre-Qualified Lists of Underwriters, Financial Advisors and Counsel – Authorization to Adopt the New York State Urban Development Corporation d/b/a Empire State Development's Pre-Qualified Lists of Underwriters, Financial Advisors and Counsel
- E. Amended Corporation Conflict of Interest and Related Party Transaction Policy and Amendments to the By-Laws in Accordance with Amendments to the New York Not-For-Profit Corporation Law - Approval of an Amended Conflicts Policy and Approval of Amendments to the By-Laws and Related Actions

II. FOR CONSIDERATION

- A. Amendment to Lease between Brooklyn Arena Local Development Corporation and Brooklyn Events Center, LLC – Board Authorization to Enter into a Second Amendment to Agreement of Arena Lease
- B. Procurement of Legal Services – Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. - Authorization to Accept an Assignment of a Contract to Provide Legal Services in Connection with Granting Consent to an Amendment to the Lease of the Arena at Barclays Center in Brooklyn, NY and to Take Related Actions

Item I. A.



FOR CONSIDERATION

April 10, 2018

TO: The Directors

FROM: Howard A. Zemsky

SUBJECT: BROOKLYN ARENA LOCAL DEVELOPMENT CORPORATION – Adoption of the Annual Report in accordance with the New York State Not-For-Profit Corporation Law and Appointment of Corporate Officers

REQUEST FOR: Authorization to Adopt the Annual Report; Appoint Corporate Officers; and Take Related Actions

I. BACKGROUND

The Brooklyn Arena Local Development Corporation (the “Corporation”) is a corporation as defined in subparagraph (a)(5) of Section 102 of the New York Not-For-Profit Corporation Law (“NYPNCL”) and is a charitable not-for-profit corporation as defined under Section 201(b) of the NYPNCL and Section 1411 of the NYPNCL.

The Corporation was formed to finance certain components of a redevelopment project in the Atlantic Yards area of Brooklyn, New York, including the design, development, construction and operation of an arena for use by a professional basketball team and for other sports and arena events. It undertakes its public purpose by issuing federally tax-exempt and/or taxable bonds.

In 2009, the Corporation issued \$510,999,996.50 of its PILOT Revenue Bonds, Series 2009 (Barclays Center Project). In 2016 the Borrower, Arena Co, refinanced a portion of the Bonds to lock in more favorable interest rates. A total of \$750,355,000 of the bonds remain outstanding.

The Corporation is required by the NYPNCL to present an annual report. In addition, certain officers have resigned or need to be replaced.

II. ADOPTION OF THE ANNUAL REPORT

Section 519 of the NYPNCL requires that the board of a not-for-profit corporation (the “Board”) annually present a report to the members showing in appropriate detail the assets and liabilities; the principal changes in the assets and liabilities as of the end of a twelve-month

fiscal period; the revenues and receipts, both restricted and unrestricted; the expenses or disbursements, general or restricted; the number of members of the Corporation (the "Members"); and a statement of the place where the names and places of the members may be found. The statute also requires that the Board ratify the adoption and presentation of the annual report to the Members.

Staff recommends that the Board adopt note 3(c), dedicated to the Corporation, of the audited combined financial statements of the New York Job Development Authority ("NYJDA") as of March 31, 2017 and 2016 and directs such annual report to be presented to the Members; and that the Board authorize the presentation to the Members of the applicable note of the audited financial statements of the NYJDA as of each subsequent fiscal year as the respective annual report of the Corporation. The names of the Members can be found at the offices of ESD, Corporate Secretary, 633 Third Avenue, New York, New York 10007.

III. APPOINTMENT OF OFFICERS

Due to resignations there are two officer vacancies. Staff recommends that the positions of Treasurer and Secretary be filled by the individuals noted in the attached Resolution. All the proposed officers have served, or are serving, in similar capacities for other state entities.

IV. ENVIRONMENTAL REVIEW

Staff has determined that the proposed authorization constitutes a Type II action as defined by the New York State Environmental Quality Review Act and the implementing regulations for the New York Department of Environmental Conservation. No further environmental review is required in connection with this authorization.

V. REQUESTED ACTIONS

The Board is being requested to adopt the Annual Report, appoint Corporate Officers; and Take Related Actions.

VI. RECOMMENDATION

Based on the foregoing, staff recommends approval of the requested actions.

VII. ATTACHMENTS

Resolution
Exhibit A: Annual Report

April 10, 2018

BROOKLYN ARENA LOCAL DEVELOPMENT CORPORATION – Adoption of the Annual Report in accordance with the New York State Not-For-Profit Corporation Law (the “NYPCL”) and Authorization to Appoint Corporate Officers

WHEREAS, the Certificate of Incorporation of the Brooklyn Arena Local Development Corporation (the “Corporation”) was duly filed in the office of the Secretary of State of the State of New York on November 6, 2008; and

WHEREAS, it is now appropriate for the Board of Directors of the Corporation (the “Board”) to elect the officers of, and transact other necessary corporate business of the Corporation.

NOW, therefore, the Board, upon motion duly made and seconded, adopts the following Resolution:

Annual Report

RESOLVED, that on the basis of and in accordance with the materials presented to this meeting, a copy of which is hereby ordered to be filed with the records of the Corporation the Board adopts note 3(c) of the audited combined financial statements of the New York Job Development Authority (“NYJDA”) as of March 31, 2017 and 2016 as the annual report of the Corporation and directs such statements to be presented to the Members, a copy of which is attached to this Resolution as Exhibit A;

RESOLVED, that the proper officers of the Corporation be, and each of them hereby is, authorized, empowered and directed to take all such further actions and to execute, deliver, certify and file all such further agreements, undertakings, certificates, instruments and documents, in the name and on behalf of the Corporation, under its corporate seal or otherwise, and to pay all such costs, fees and expenses as such officers shall approve as necessary or advisable to carry out the intent and accomplish the purpose of the foregoing resolutions and the transactions contemplated thereby, the taking of such actions and the execution, delivery, certification and filing of such documents to be conclusive evidence of such approval

Officers

RESOLVED, that the following people be, and each of them hereby is, elected to the offices set forth opposite their respective names, each person to hold his or her respective office until the earlier of such person’s resignation, death or incapacity, or until a successor has been duly elected and qualified:

Name

Title

Elaine A. Kloss
London Cruz

Treasurer
Secretary

* * *

EXHIBIT A

NEW YORK JOB DEVELOPMENT AUTHORITY

Notes to Combined Financial Statements, Continued

Note 3 - Local Development Corporations, Continued

c) Brooklyn Arena Local Development Corporation

In November 2008, the Authority caused the creation of Brooklyn Arena Local Development Corporation ("BALDC"). BALDC has state-wide jurisdiction and was created as a conduit for the issuance of both taxable and tax-exempt bonds to finance the construction and related cost of the Barclays Center Project.

The summarized statements of net position of BALDC at March 31, 2017 and 2016 is as follows:

	<u>2017</u>	<u>2016</u>
Cash and equivalents	\$2,179,312	197,428
Accounts payable and accrued expenses	-	-
Net position	<u>\$2,179,312</u>	<u>197,428</u>

The summarized statements of revenue, expenses and changes in net position of BALDC for the years ended March 31, 2017 and 2016 is as follows:

	<u>2017</u>	<u>2016</u>
Interest income	\$ 1,491	237
Bond and note fee income	1,980,995	-
Operating expenses	<u>(602)</u>	<u>-</u>
Change in net position	<u>\$ 1,981,884</u>	<u>237</u>

In September 2016, BALDC issued PILOT Revenue Refunding Bonds, Series 2016 (Barclays Center Project) in the aggregate face amount of \$494 million (at an issue price of \$567 million) for the purpose of refunding a portion of the Series 2009 PILOT Revenue Bonds (Barclays Center project) and to pay the costs of issuance of the Series 2016 PILOT Bonds.

BALDC did not issue bonds during the years ended March 31, 2016.

As of March 31, 2017, the total outstanding conduit debt is \$750 million. BALDC bonds are not the obligation of BALDC, the Authority or the State. Repayment of the bonds will be made from payment-in-lieu-of taxes and rental payments made by the Barclays Center Project developer.

Item I. B.



FOR CONSIDERATION

April 10, 2018

TO: The Directors

FROM: Howard A. Zemsky

SUBJECT: BROOKLYN ARENA LOCAL DEVELOPMENT CORPORATION – Procurement Guidelines

REQUEST FOR: Authorization to Adopt Revised Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts

I. BACKGROUND

The Brooklyn Arena Local Development Corporation (the “Corporation”) will enter into various contracts in the course of conducting its authorized purposes. In order to ensure the consistent, fair and competitive retention of goods and services staff recommends the voluntary adoption of procurement guidelines adopted by the New York State Urban Development Corporation d/b/a Empire State Development (“ESD”) Board of Directors at their March 29, 2018 meeting. Approval of these Guidelines (the “proposed 2018 Guidelines”) is sought. The proposed 2018 Guidelines will replace the procurement guidelines previously adopted by the Corporation.

The proposed 2018 Guidelines attached to this memorandum set forth the policies and procedures to be followed by the Corporation when seeking to contract for goods or services. It should be noted that these Guidelines do not have the force of law; are only required of public authorities and public benefit corporations, not local development corporations such as the Corporation; and are proposed as a statement of best practices and procedures. No contract is invalid merely because these guidelines have not been followed.

The proposed 2018 Guidelines define the universe of procurement transactions which are subject to the policies and procedures. Generally, all procurements by the Corporation must be competitive, except where State law provides for non-competitive sourcing (e.g., goods purchased from approved non-profit agencies for the blind and procurements from the Office of General Service’s Centralized Contracts List). Based on the expected cost of procured goods and/or services, procurement contracts must be obtained after advertisement in the New York State Contract Reporter, except in limited instances where an exemption is obtained, generally

reserved for sole or single source procurements (when only one vendor offers the desired goods or services or when a single vendor has unique qualities or experience that obviate a competitive process). The proposed 2018 Guidelines explain the various means of obtaining goods and services in an open, accountable and transparent manner, including incorporation of ESD's Bid Opening Guidelines and the compilation of a Procurements Record for every covered Procurement Contract.

For informational purposes, please note that the proposed 2018 Guidelines comply with the applicable provisions of the Public Authorities Law, the State Finance Law and the State Tax Law. They are consistent with the State Procurement Council's Guidelines and with the Governors' directive that all state agencies and public authorities make responsible spending decisions and that they be accountable for sufficient monitoring of their spending to ensure the highest level of fairness, non-discrimination, openness and transparency.

The proposed 2018 Guidelines reflect the Board's determination, pursuant to a separate item at this meeting, that procurement contracts, in an amount up to and including \$250,000, may be approved by the President of the Corporation or his duly appointed designee, and do not require formal Board approval. An exception to this procedure is that contracts for personal services that will have a term of one year or more continue to require Board approval (as well as annual review).

The proposed 2018 Guidelines are intended to be user-friendly and are set forth in a logical and coherent fashion that will assist staff in understanding the procedures to be followed and the substantive rules that govern procurements.

Sources of help to users and information are included as clickable links, and virtually all required forms and ESD policy and procedure documents can also be accessed from within the document by hyperlinks. The hard copy of the proposed 2018 Guidelines presented to the Directors for approval cannot contain these links, but they are shown in highlight form.

II. RECOMMENDATION AND REQUESTED ACTION

The Directors of the Corporation are being requested to adopt the proposed 2018 Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts, effective as of the date of approval.

III. ATTACHMENTS

Resolution

Exhibit A: Proposed 2018 Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts

April 10, 2018

BROOKLYN ARENA LOCAL DEVELOPMENT CORPORATION – Adoption of Revised
Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts

BE IT RESOLVED, that on the basis of the materials presented to this meeting, a copy of which is hereby ordered to be filed with the records of the Corporation, the proposed 2018 Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts, a copy of which is attached to the materials, be and hereby is approved and adopted as of the date hereof, as a statement of best practices and procedures, and the President or his/her designee is authorized to promulgate the said Guidelines in electronic form and other media for the use of the staff of the Corporation and to take such other and further action as may be deemed necessary or appropriate to effectuate the foregoing Resolution.

* * *

Exhibit A

2018 Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts

Revised Procurement Guidelines 2018

NEW YORK STATE URBAN DEVELOPMENT CORPORATION
D/B/A EMPIRE STATE DEVELOPMENT
Guidelines Regarding the Use, Awarding, Monitoring
and Reporting of Procurement Contracts

Effective March 29, 2018

Table of Contents

1. Overview and Requirements	1
1.1. Contracts covered, and not covered, by the Guidelines	1
1.2. Types of Procurement Contracts	2
1.3. General Procurement Principles	3
2. Procurement: Overview and Requirements	4
2.1. The Procurement Process Guide	4
2.2. NYS Preferred Sources	5
2.3. OGS Centralized Contracts	5
2.4. Commodities Contracts	5
2.5. Service Contracts	5
2.6. Discretionary Purchases	6
2.7. Piggyback Contracts	6
3. Contract Reporter Exemptions	7
3.1. Reasons for Exemptions	7
3.2. Authorization for Exemptions	8
4. How to Conduct a Competitive Solicitation	9
5. Approval to Advertise	10
6. Contents of ANY Procurement Solicitation	10
7. Types of Solicitations	11
7.1. General	11
7.2. Requests for Proposals (“RFP”)	12
7.3. Requests for Statements of Qualification (“RFQ”)	13
7.4. Requests for Expressions of Interest (“RFEI”)	13
8. Compliance with Other Laws	13
8.1. Compliance with State Finance Law § 139-j and 139-k (Lobbying)	13
8.2. Compliance with State Tax Law § 5-a (Sales Tax Registration)	15
8.3. Compliance with Executive Order 177 (Prohibiting Contracts with Entities that Fail to Address Discrimination)	15
8.4. Compliance with Executive Law Articles 15-A & 17-B: Contractor and Supplier Diversity	16
8.5. Compliance with Iran Divestment Act of 2012	18
8.6. Encouragement of use of New York Businesses as sub-contractors and suppliers.	19
8.7. Project Sunlight	19
8.8. Publication on ESD Website	19
8.9. Contract Reporter Advertising Process	20
8.10. Selection Criteria	20
8.11. Bid Opening Procedures	20
8.12. Bid Evaluation and Vendor Selection	21
8.13. Determination of Responsibility – “CLIP Review” and the VendRep form	21
8.13.1. Cancellation of a Solicitation	22
8.14. Procurement Record	23
9. Contract Approval	23

9.1.	Board Materials	23
9.2.	ESD Contract and Amendment Approval	24
10.	Steps After Contract Approval Is Obtained	27
10.1.	Commitment Request Process (for contracts of \$50,000 or more)	27
10.2.	Contract Reporter Award Notification	29
10.3.	[INTENTIONALLY OMITTED]	29
10.4.	Department of Budget (“DoB”) Approval	29
10.5.	OSC Jurisdiction Over Contracts in Excess of \$1 Million.....	29
12.	Monitoring of Procurement Contracts	30
13.	Ethical Considerations	31
13.1	Procurement Contracts Involving Former Employees of ESD	31
13.2	Conflicts of Interest.....	32
13.3	Unfair Advantage Prohibited	32
14.	Implementation of These Guidelines	32
15.	Reporting.....	32
15.1.	Annual Reports.....	32
16.	Effect on Awarded Contracts.....	33

NEW YORK STATE URBAN DEVELOPMENT CORPORATION
D/B/A EMPIRE STATE DEVELOPMENT (“ESD”)

Guidelines Regarding the Use, Awarding, Monitoring and
Reporting of Procurement Contracts

Effective March 29, 2018

1. Overview and Requirements

The following guidelines (the “Guidelines”) are applicable to the use, awarding, monitoring and reporting of procurement contracts of the New York State Urban Development Corporation, d/b/a Empire State Development and its subsidiaries (collectively, “ESD”). ESD is required to adopt procurement guidelines by Article 9, Title 4 of the Public Authorities Law (“PAL”). The same law requires annual review and updating of the guidelines by the ESD Board of Directors (“Board”), including subsidiary Boards.

These Guidelines are modeled on the New York State Procurement Guidelines published by the State Procurement Council (the “SPC Guidelines”). The SPC Guidelines apply to all State agencies and thus provide useful guidance for procurement by ESD (which is not a State agency as that term is defined in the SPC Guidelines). The SPC Guidelines cover some issues and procedures rarely encountered by ESD, but should be consulted by staff if a situation arises that does not appear to be covered in these Guidelines, since useful guidance may thereby be obtained. View the [SPC Guidelines](#).

In these ESD Guidelines, a person, firm or corporation who wishes to provide goods and/or services to ESD may be called a “**vendor**” or “**offerer**” or, when responding to a public solicitation for qualified vendors or expressions of interest in becoming an ESD vendor, a “**respondent**.”

1.1. Contracts covered, and not covered, by the Guidelines

Pursuant to PAL § 2879 (2), “**Procurement Contracts**” are any written agreements for the acquisition of goods or services of any kind in the actual or estimated amount of five thousand dollars (\$5,000) or more. For purposes of compliance with anti-lobbying laws contained in State Finance Law § 139-j and 139-k (see p. 12), Procurement Contracts also include the purchase, lease or grant of any other interest in real property which involves an estimated annualized expenditure by ESD in excess of fifteen thousand dollars (\$15,000).

Disposition of property (real or personal) by ESD is not a procurement covered by these Guidelines, but is instead subject to ESD's [Property Disposition Guidelines](#). However, where a property disposition requires a competitive process, that process should be conducted in accordance with these Guidelines to the extent practicable.

Loans and grants made by ESD in furtherance of its economic development mission are not Procurement Contracts, but may be subject to certain provisions of these Guidelines, including Office of the State Comptroller ("OSC") review and approval for grants over \$1 million (see p. 23, Section 10.5).

A Contract or Memorandum of Understanding ("MOU") with a sister State agency or authority is not considered a Procurement Contract covered by these Guidelines. Note, however, that appropriate approval(s) as set out in these Guidelines (including Board approval based on the amount and/or duration of the agreement, as well as OSC approval for binding agreements) may apply to MOUs.

In connection with certain of its projects, ESD may need to obtain a license from a governmental agency, authority, or company or a public utility in order to enter the licensor's premises and perform work. As a precondition to receiving the license, ESD can be required to enter into agreements with the licensor that prescribe conditions for work to be performed on the site, including work and/or oversight of work which must be performed by the licensor's personnel or contractors, as well as payment of licensor costs by ESD. Examples include licenses for work on rail and utility facilities. Agreements of this kind, often referred to as "**forced contracts**," are not covered by the competitive solicitation requirements of these Guidelines, because ESD has no discretion or authority with respect to the work to be performed by the licensor's personnel and contractors. However, appropriate approval(s) as set out in these Guidelines (including Board approval based on the amount and/or duration of the agreement) would apply.

Procurement Contracts **under \$50,000** may be handled by **Purchase Order** approved by Department Head, Procurement Department, Controller's Office and Contracts Administration. A formal competitive solicitation is not required, but these purchases should be made after obtaining three quotes whenever practicable. For further information, consult the Procurements Director.

1.2. Types of Procurement Contracts

The types of goods and services requiring Procurement Contracts include goods and services needed to proceed with an ESD project, or to support the administrative needs of ESD. Procurements of goods cover the entire spectrum of goods, ranging from pens to motor vehicles.

Procurements of personal services include but are not limited to legal, accounting, auditing, management consulting, investment banking, underwriting, financial advice, temporary employees, planning, training, statistical analysis, research, public relations, architectural, engineering, construction, surveying, appraisal, or other services of a consulting, professional or technical nature for a fee, commission or other compensation by a person or persons who are not providing such services as officers or employees of ESD.

Reasons for procuring personal services include:

- a. Requirements of special expertise or unusual qualifications;
- b. Nature, magnitude or complexity of services required;
- c. Lack of sufficient in-house resources, support staff, specialized facilities or equipment;
- d. Short-term or infrequent need for the services; and
- e. Distance of the location(s) where the services must be performed from ESD offices or facilities.

1.3. General Procurement Principles

ESD's procurement process is designed to:

- Ensure fair and open competition;
- Guard against favoritism, improvidence, extravagance, fraud and corruption;
- Ensure that the results meet agency needs;
- Provide checks and balances to regulate agency procurement activities; and
- Protect the interests of ESD, the State and taxpayers.

Procurement Contracts are to be awarded on a **competitive basis** to the maximum extent practicable. Such awards are generally made after notice is published in the **New York State Contract Reporter** where the amount of the contract is **\$50,000 or more** and after the evaluation of proposals obtained, whenever practicable, from at least three qualified vendors or respondents, including where practicable at least one State-certified minority- or woman-owned business enterprise ("MWBE") and one service-disabled veteran-owned business ("SDVOB"). (See Section 7: Types of Solicitations). Monetary thresholds may not be avoided by artificially splitting or breaking up contracts into lesser agreements, or entering into a series of agreements, for sums below the dollar thresholds.

Competition in the procurement process serves both ESD and potential vendors by ensuring that the procurement process produces an optimal solution at a reasonable price; and allowing qualified vendors an opportunity to obtain ESD business, while the process guards against inflated pricing, favoritism, fraud and collusion; and allows all qualified vendors an opportunity to obtain ESD business.

2. Procurement: Overview and Requirements

2.1. The Procurement Process Guide

I. Procurements \$5,000 to \$50,000

If ESD's procurement needs can be met by a preferred source vendor, you must use this option. See next page.



If ESD's needs cannot be met by a preferred source, you may elect to use an OGS Centralized contract. Wherever practicable, you should still solicit two other quotes if this option is selected.



If ESD's needs cannot be met by the above mentioned options, you may elect to use a discretionary purchase through the use of a NYS certified MWBE, SDVOB or a NYS Small Business. See Section 2.6.



If ESD's needs cannot be met by the above mentioned options, you may elect to use an informal solicitation. Contact the Procurement Unit for further assistance if needed.



If this is an emergency situation or only one vendor can meet the needs required for service, the initiating department head has to justify the need to Single Source or Sole Source this request in the justification memo.

II. Procurements \$50,000 +

If ESD's procurement needs can be met by a preferred source vendor, you must use this option. See next page.



If ESD's needs cannot be met by a preferred source, you may elect to use an OGS Centralized contract. Wherever practicable, you should still solicit two other quotes if this option is selected.



If ESD's needs cannot be met by the above mentioned options, you may elect to use a discretionary purchase through the use of a NYS certified MWBE, SDVOB or a NYS Small Business up to \$200,000. See Section 2.6.



If ESD's needs cannot be met by the above mentioned, use a Request for Proposals ("RFP"), Request for Qualifications ("RFQ") or Request for Expressions of Interest (RFEI"), and advertise in the Contract Reporter if this is not an emergency situation and ESD's needs can be met by more than one vendor.



If this is an emergency situation or only one vendor can meet the needs required, obtain a Contract Reporter Exemption from the Legal Department using Single Source or Sole Source exemption as appropriate.

2.2. NYS Preferred Sources

Goods and services needed by ESD may be available, without the need for competitive procurement, from New York State Preferred Sources. If a Preferred Source has goods or services available in the form, function and utility required by ESD, at a price not more than 15% above the prevailing market rate, the goods or services should be obtained through the Preferred Source in the following prioritized order: NYS Department of Correctional Services Correctional Industries Program (CORCRAFT); approved charitable non-profit agencies for the blind; and approved charitable non-profit agencies for the severely disabled, qualified programs for the mentally ill, and qualified veterans workshops. For information on these Preferred Sources, see State Finance Law §162 and the Office of General Services (“OGS”) [Preferred Sources Guide](#). The Guide is exhaustive, but the main points are easy to follow.

2.3. OGS Centralized Contracts

Goods and services needed by ESD may be available, without the need for competitive procurement, through centralized contracts held by OGS. Information about centralized contract offerings can be obtained from the [list of approved State contractors](#) maintained by OGS.

Note that even if an OGS centralized contractor is available, it is required where feasible that staff obtain three price quotes from other OGS contractors or other vendors not on the OGS list, including at least one MWBE or SDVOB certified firm, unless a compelling justification exists (e.g., experience with a particular project). Staff should confirm that a firm is certified on either the MWBE directory (<https://ny.newnycontracts.com>) or SDVOB directory (http://ogs.ny.gov/Core/Docs/CertifiedNYS_SDVOB.pdf).

2.4. Commodities Contracts

The OGS Procurement Services Group (PSG) establishes centralized contracts for commodity contracts in the form, function and utility required by State agencies, for a wide range of items commonly acquired by agencies. If the commodity is available from a centralized contract in form, function and utility consistent with ESD’s need, such item may be purchased from the centralized contract. However, ESD may competitively procure items otherwise available on a centralized contract when the resultant price is less.

2.5. Service Contracts

ESD has discretion to use the OGS centralized service contracts list. A wide and diverse range of services from routine maintenance to complex technology-based acquisitions are available through these OGS contracts. Again, ESD may competitively procure items otherwise available on the OGS centralized contract list when the resultant price is less.

2.6. Discretionary Purchases

Pursuant to PAL § 2879(3)(b)(i), ESD may purchase services or commodities from small business concerns or those certified pursuant to Article 15-A of the Executive Law (**MWBEs**), or commodities or technology products that are recycled or remanufactured, in an amount up to two hundred thousand dollars (\$200,000) without a “formal competitive process.” In such a case, three quotes should be obtained wherever practicable, and Contract Reporter advertising is advisable when time permits. Recommended language for such advertisements can be found at <http://www.ogs.ny.gov/procurecounc/pdfdoc/DiscretionaryPurchasingGuidelines.pdf>. Staff should assess whether a formal competitive process, or one that is less formal but still competitive, may best meet ESD’s needs. The award of a discretionary purchase contract should be published in the Contract Reporter..

As with any other procurement, for discretionary purchases the initiator must:

- review the Preferred Source list and OGS Centralized Contracts to determine whether the desired goods or services are available to meet ESD’s needs;
- ensure that the commodities, services or technology acquired meet ESD’s form, function and utility needs;
- document and justify the selection of the vendor;
- document and justify the reasonableness of the price; and
- ensure that ESD buys from responsible vendors.

2.7. Piggyback Contracts

ESD may find it efficient to establish a contract based on another governmental entity’s contract. This is known as “piggybacking” and may be used in accordance with the criteria established by OGS in the Contract Piggybacking Guidelines under State Finance Law § 163(10)(e), available at https://nyspro.ogs.ny.gov/sites/default/files/uploaded/PSPiggybackGuide_2.2015.pdf. Note that a piggyback procurement requires approval by the OGS Procurement Services Group – this can be difficult and time-consuming to accomplish, as the OGS staff are not very familiar with public authority procurement policies and practices. For example, if the agency you wish to piggyback on is a State agency, it will have different contractual terms than those used by ESD. This may lead to delay, if OGS decides to seek approval of the proposed ESD contract terms from the Attorney General. Piggybacking is better accomplished when you wish to use a contract established by another public authority.

3. Contract Reporter Exemptions

3.1. Reasons for Exemptions

Advertising a procurement in the Contract Reporter is generally required unless specific grounds exist that constitute a reason for exemption. A Contract Reporter exemption may be granted by the Officer(s) specified in Attachment A to these Guidelines, only if any of the following circumstances can be demonstrated:

- (a) **Sole Source.** Only one source for the goods or services is available. Three examples of sole source procurements: (i) proprietary software compatible with ESD operating systems that no-one else offers; (ii) a printer's warranty requiring that only a toner cartridge supplied by the manufacturer could be used without voiding the warranty; (iii) a vendor has developed a proprietary system for remediating contaminated land, unavailable from anyone else.
- (b) **Single Source.** The required goods or services are available from two or more vendors, but a particular vendor is preferable because of specific factors such as, without limitation, past experience with a particular issue; familiarity with ESD's operations; experience with similar projects of ESD, other agencies or at other levels of government; demonstrated expertise; or capacity and willingness to respond to the situation. An example would be a competitively-procured environmental consultant who worked on an EIS for a project and now a Supplemental EIS is required for the same project; many consultants could do the work, but the original consultant's familiarity with the project justifies selection as a single source. Where a vendor's past experience or familiarity with ESD was gained through a non-competitively awarded contract, staff are strongly encouraged to conduct a competitive solicitation rather than pursue a single source exemption for that vendor to perform additional work. *In general, the Corporation's policy is to minimize the use of single source contracts and to maximize the use of competitive procurement methods.*
- (c) **Emergency Circumstances.** Emergency circumstances exist when an urgent and unexpected situation arises which places public health or safety or the use or conservation of resources at risk and requires immediate action. Poor or late planning does not constitute an emergency. Contracts entered into as a result of an emergency situation should only cover the goods or services reasonably necessary to stabilize, ameliorate or remedy the situation. An example is a hazardous condition at a building owned by ESD: a contractor can be hired immediately to deal with the situation.

NOTE: Notwithstanding any Contract Reporter exemption that may be granted for any of the reasons set forth above, a reasonable attempt should be made wherever practicable to solicit at least three competitive bids, with written confirmation of the bids furnished within a reasonable time and maintained in the contract file. Also, any sole or single source contract awarded in the amount of \$50,000 or more should be published in the Contract Reporter (Economic Development Law, §143(4)). This publication requirement does not apply to contract amendments.

3.2. Authorization for Exemptions

The initiator of the proposed contract must complete a Contract Reporter Exemption form, signed by the Officer(s) specified in Attachment A to these Guidelines.

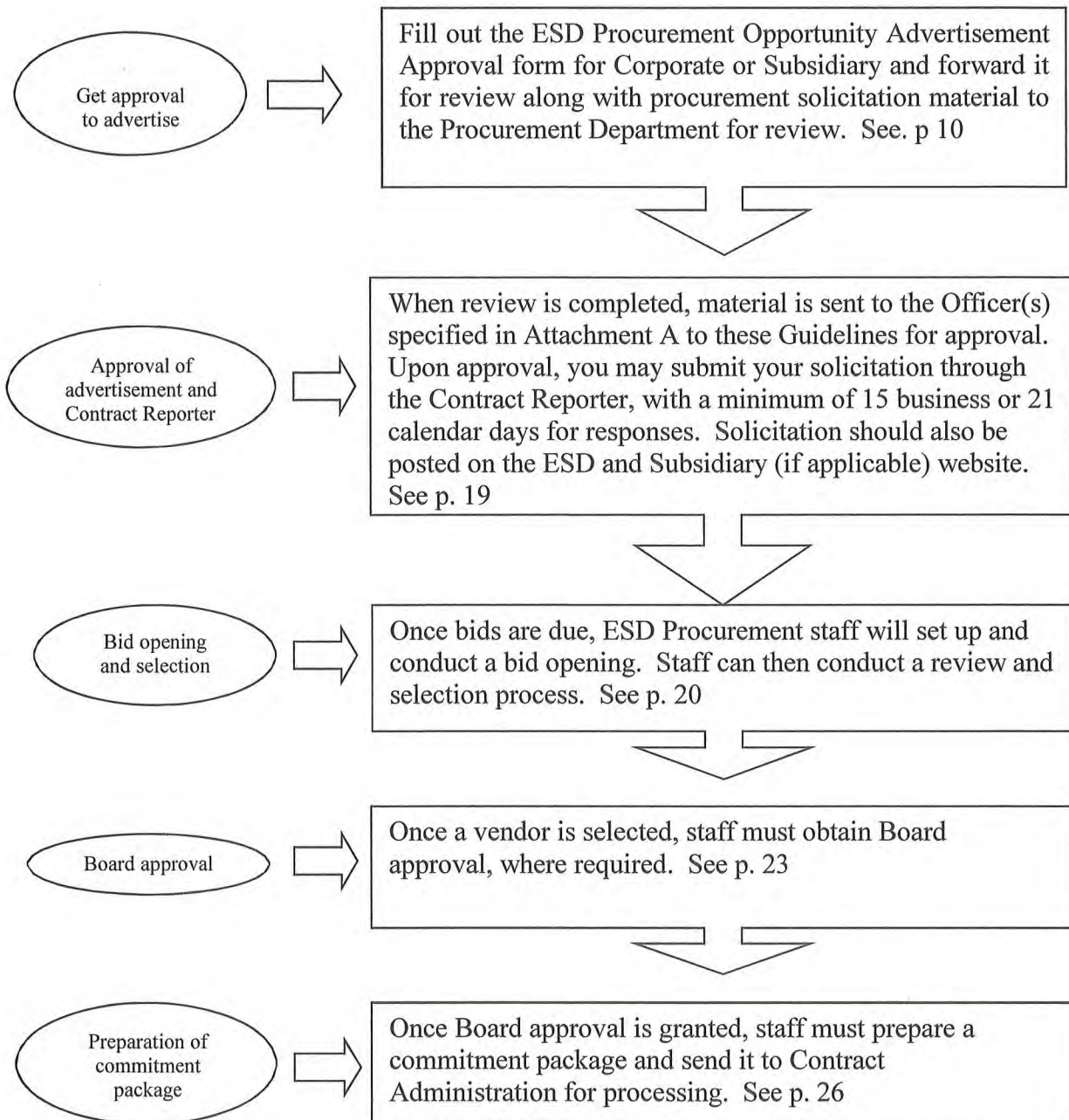
The memorandum requesting the exemption must document in reasonable detail: the circumstances establishing the exemption justification; a description of the goods or services to be acquired via the exemption; description of funding source; any alternatives considered; and the basis for determining that the cost of the proposed contract is reasonable under the circumstances. The Contract Reporter Exemption form can be found [here](#).

If the proposed contract amount is over \$250,000, or is a personal services contract that will last more than one year, the exemption authorization should be obtained before ESD Board or President approval. If the proposed amount is \$250,000 or less, and the term of the contract is less than one year, the exemption authorization should be obtained from the Officer(s) specified in Attachment A to these Guidelines, prior to contract execution and the commencement of any services or delivery of any goods.

Note that even if a Contract Reporter exemption is granted, compliance with SFL § 139-j and 139-k (Lobbying Laws) and State Tax Law § 5-a must still be satisfied (see Section 8.1, p.12). Where appropriate, a statement from the staff initiator that the price obtained for the goods or service is compatible with market pricing must be presented with the exemption request.

At the time ESD enters into a contract with a single or sole source provider for an amount in \$50,000 or more, ESD should submit an announcement of the contract for publication in the NYS Contract Reporter, and must identify the recipient of the contract.

4. How to Conduct a Competitive Solicitation



5. Approval to Advertise

Prior written approval of the Officer(s) specified in Attachment A to these Guidelines is required when you need to advertise a procurement opportunity, including Requests for Proposals (“RFPs”), Requests for Statements of Qualifications (“RFQs”) and Requests For Expression of Interest (“RFEIs”) (See Section 7: Types of Solicitation).

Note also that other approvals may be required to comply with State Division of Budget procedures (see Section 11.4). Submit the ESD Procurement Opportunity Advertisement Approval form (select [Corporate](#) or [Subsidiary](#)) to the appropriate officer at least 10 business days in advance of the relevant New York State Contract Reporter publication submission date (the Contract Reporter is published daily).

6. Contents of ANY Procurement Solicitation

For all Procurement Contracts (see section 1.1), whether the procurement is formal (such as an RFP, RFQ or RFI) or informal (such as procurement for less than \$50,000, or a Discretionary Purchase from an MWBE for up to \$200,000, or procurement from a pre-qualified list) the same basic information should be included in the solicitation:

- (i) What goods are being sought or what scope of services is desired;
- (ii) What the projected length (“term”) of the resultant contract will be;
- (iii) What criteria will be used in evaluating bids, and how those criteria are weighted. For example, price, bidders’ expertise, the qualifications of the proposed staff; past history of government contracts, references/testimonials, understanding of ESD’s mission, and either diversity practices (commitment to sound diversity practices within the firm) or a firm’s status as a certified MWBE and/or SDVOB¹;
- (iv) A schedule of relevant dates (when bid is due, when questions may be asked or briefing meetings/interviews held, etc);
- (v) Contact information for a designated contact at ESD who is the only person at ESD to whom communications about the solicitation may be directed. Failure to abide by this requirement may result in disqualification of the bidder.

¹ Program regulations provide that ESD can either score a firm’s diversity practices or the firm’s status as a certified MWBE, but not both in the same procurement. So, if certified firms are likely to respond, then the solicitation should request proof of certified status. But if it is more likely that no MWBE will respond to a solicitation, the solicitation should request diversity practice information instead. In either event, this factor must not exceed 10% of the overall technical score.

- (vi) ESD's insurance requirements (obtained from Contract Administration for all solicitations);
- (vii) ESD's contractor and supplier diversity requirements: MWBE and SDVOB goals, if applicable (goals should be identified before seeking approval to advertise);
- (viii) Disclosure to bidders that they must be able to demonstrate that they are responsible bidders, in good standing under the laws of New York and capable of fulfilling the requirements of the contract, and untainted by past non-performance or criminality;
- (ix) A copy of the ESD standard terms and conditions to which the successful bidder will be expected to agree. This will generally be ESD's Schedule A - Standard Terms and Conditions (For [Materials and Services](#) or for [Law Firms](#)). IMPORTANT: ESD's standard terms and conditions must be sent to potential vendors as early in the process as possible, to avoid later disputes about terms.
- (x) VENDREP Form where needed (See Section 8.13);
- (xi) Proof that the vendor is authorized to do business in New York State, if services are to be performed in New York State. Generally, this will require NYS Department of State Registration, which can be checked [here](#);
- (xii) Encouragement of use of New York State businesses as sub-contractors or suppliers (See Section 8.6).

A template for informal solicitation language can be viewed [here](#).

7. Types of Solicitations

7.1. General

There are a number of procurement techniques available, including Request for Proposals (RFP) and Request for Statements of Qualifications (RFQ) and, rarely, Requests for Expressions of Interest (RFEI). When selecting among these various approaches, the determining factors are:

- The importance of price or cost as a component in the review of incoming bids or proposals; and
- The ability to define specifications for goods or services being acquired, or to obtain those specifications from potential vendors (where the RFEI may be useful).

Generally, contracts for goods are to be awarded on the basis of "lowest price" and contracts for services are to be awarded on the basis of "best value" among responsive and responsible

vendors. “Best value” is the basis for awarding service and technology contracts to the vendor that optimizes quality, cost and efficiency, among responsive and responsible vendors. The basis for a “best value” contract award must be, wherever possible, quantifiable. However, all procurement solicitations issued by ESD are to be guided by the same basic principles:

Clarity: Procurement documents should clearly convey to vendors what ESD wants to buy;

Fairness: No vendor should be advantaged over another. All information concerning the solicitation shall be conveyed in writing to all vendors participating in the process, including but not limited to process rules and evaluation criteria;

Openness: All relevant vendors should have an equal opportunity to respond to the offering.

Disclosure of Selection Criteria: The criteria for awards should be developed before bids/proposals are received. Vendors should know generally the basis upon which their offers are being judged. Note that if cost is weighted below 20%, a written justification for such weighting should be prepared and included in the Procurement Record;

Efficiency: The process should be efficient, fair and able to withstand public scrutiny.

7.2. Requests for Proposals (“RFP”)

RFP solicitations may range from relatively uncomplicated procurements to highly complex, long term efforts involving the significant commitment of both ESD and vendor resources.

RFPs follow a common format, focusing on a description of tasks including, but not limited to:

- Description of program objectives and background;
- Scope of services to be provided;
- Detailed requirements or specifications (required qualifications of vendors, “what” is needed and “how” services should be provided). Note that the terms of the RFP may not be knowingly tailored to favor a particular vendor.

Click [here](#) to view ESD’s standard RFP template.

7.3. Requests for Statements of Qualification (“RFO”)

RFQs are appropriate for retention of qualified pools of contractors to provide defined types or scopes of services (and, rarely, goods) required by ESD on a regular or semi-regular basis as the need arises. Competitive establishment of a pool or list of pre-qualified vendors is appropriate, for example, in the case of contractors or property appraisers. If ESD has established a list of pre-qualified contractors, unless services will be rendered by all qualified vendors at rates not to exceed a pre-set maximum, three quotes should be obtained from vendors on the list, and/or from vendors known to ESD outside the list. Amendments to contracts with vendors selected from a pre-qualified list should also follow this mini-bid process (and comply with all requirements in Section 9.2).

Where a vendor’s eligibility to be on a pre-qualified list is contingent upon the vendor’s agreement that professional services will be rendered at pre-established rates, or will not exceed certain limits, this solicitation should be accomplished through an RFP.

After ESD has established a list of pre-qualified vendors, staff may enter into open retainer contracts with one or more vendors on the list, for no set dollar amount but in the case of personal services not to exceed a term of three years. This process facilitates the use of purchase orders against the contract, and Board or President/CEO approval, if required, can be obtained at such time as a scope of services and dollar amount are identified, or if the term will be extended beyond one year. Please consult with Procurement and Legal if you wish to enter into such an arrangement.

7.4. Requests for Expressions of Interest (“RFEI”)

RFEIs are generally appropriate when ESD does not know the precise scope of services or goods required, and wishes to obtain this information from prospective vendors. An example would be a proposal for adaptive re-use of ESD or other State surplus property, where the re-use is likely to be dependent on the prospective respondents’ needs or ideas.

8. Compliance with Other Laws

8.1. Compliance with State Finance Law § 139-j and 139-k (Lobbying)

State Finance Law (“SFL”) § 139-j and 139-k apply to all Procurement Contracts over \$15,000, regardless of whether the contract was competitively bid.

Among other things, SFL § 139-j and 139-k: (i) govern permissible communications between potential vendors, and staff of ESD, its subsidiaries, or other involved governmental entities during the procurement process; (ii) require the disclosure of such communications, as well as prior determinations of vendor non-responsibility; and (iii) establish sanctions for knowing and willful violations of such provisions, including disqualification from eligibility for an award of any contract.

Specifically, SFL § 139-j and 139-k require that only permitted ESD and subsidiary contact person(s) identified in solicitation materials may communicate with potential bidders regarding the solicitation, from the issuance of the earliest written notice of a Request for Proposal through the final award and approval of any resulting contract. This period is defined by law as the “Restricted Period.”

SFL § 139-j (6)(b) also requires potential vendors to complete the Offerer’s Affirmation of Understanding and Agreement to comply with ESD’s procedures relating to permissible contacts. This written affirmation is deemed to apply to any amendments to a procurement submitted by ESD after an initial affirmation is received with an initial bid.

SFL § 139-k governs the disclosure of prior non-responsibility determinations by potential vendors. SFL § 139-k(5) requires potential vendors to certify that the information they provide to ESD for consideration in its determination of vendor responsibility is true and accurate.

Therefore, all prospective vendors must complete and submit two forms mandated by SFL § 139-j and § 139-k as part of their proposals: 1) [the Offerer’s Affirmation of Understanding and Agreement](#); and 2) the Offerer’s Disclosure of Prior Non-Responsibility Determinations.

When contacted during the Restricted Period, ESD staff must obtain the following information: the name, address, telephone number, place of principal employment and occupation of the person or organization making the contact. Further, ESD staff must inquire whether the person or organization making the contact was the offerer or retained, employed or designated by the offerer. All such recorded contacts must be included in the procurement record for the procurement contract.

In addition, ESD staff must record any contacts that reasonably appear to be an attempt to influence the procurement process as well as contacts with staff members other than the designated contact person(s) during the Restricted Period of procurement. However, SFL § 139-j and 139-k do not prohibit an offerer from communicating with a member of the State legislature or legislative staff about a government procurement, provided such member of the State legislature or legislative staff is acting in his or her official capacity. If a vendor is found to have knowingly and willfully violated the State Finance Law provisions, that prospective vendor and its subsidiaries, related or successor entities will be determined to be a non-responsible vendor, and will not be awarded any contract issued pursuant to the solicitation. Two such findings of non-responsibility within a four-year period can result in debarment from obtaining any New York State government procurement contract.

For further guidance, ESD staff engaged in the procurement process should review [ESD’s policy regarding permissible lobbying contacts](#), and the [required language for solicitations by ESD and its subsidiaries](#) to ensure compliance with SFL § 139-j and 139-k.

Note that, once a recommended vendor has been selected after compliance with the competitive bidding process, it may be necessary for staff members to negotiate contract terms, etc., with the designated vendor. Those negotiations are not prohibited, and need not be conducted only by the designated contact person, although it is good practice to have the contact person present.

However, any communication from a person other than the vendor that may reasonably be considered to be an effort to influence the negotiation of a contract (either positively or negatively) is an impermissible contact and must be reported as such. For example: an ESD employee who is in the process of negotiating the terms of a land development deal which the Board has not approved, receives a call from an outside person saying that the vendor should get more development land because the vendor has a wonderful track record. Such a call constitutes lobbying and must be reported as such. The caller should be informed that the call will be reported, and asked to communicate directly with the designated contact person in the future.

8.2. Compliance with State Tax Law § 5-a (Sales Tax Registration)

State Tax Law § 5-a prohibits ESD and its subsidiaries from approving any contract valued at more than \$100,000 with any entity if that entity or any of its affiliates, subcontractors or affiliates of any subcontractor makes sales within New York State of tangible personal property or taxable services having a value over \$300,000 during the four quarters preceding the proposed contract date, and is not registered with the Department of Taxation and Finance (“DTF”) for sales and compensating use tax purposes.

Accordingly, all respondents to a solicitation where the amount of the contract is expected to exceed \$100,000 must include in their responses a properly completed [Form ST-220-CA](#). However, if a vendor is not registered with DTF because of a lack of sales of over \$300,000 within the relevant period, the vendor must submit an [affidavit so certifying](#). Note also that § 5-a does not apply to contracts for architectural, engineering or surveying services. If in doubt, contact the ESD legal department after having reviewed [DTF Publication 223](#).

Failure to include a properly completed form ST-220-CA or affidavit may be a basis for considering any such response incomplete. However, the vendor or respondent should be given an opportunity to cure such failure, because some agencies do not require the form until contract signing, and vendors may not realize that ESD practice is different. Only the primary respondent vendor completes Form ST-220-CA, but Schedule A to Form ST 220-CA requires detailed information from the vendor’s sub-contractors, such as tax ID number, etc. If applicable, certificates of authority evidencing registration with DTF for sales tax purposes must be attached by the prime vendor and all the sub-contractors.

Further in accordance with the requirements of § 5-a, any contract resulting from a solicitation will require periodic updating of the certifications contained in Form ST-220-CA.

8.3. Compliance with Executive Order 177 (Prohibiting Contracts with Entities that Fail to Address Discrimination)

EO 177, issued on February 3, 2018, directs all State agencies, including public authorities, to amend their procurement procedures to prevent contracting with entities that have institutional policies or practices that fail to address the harassment and discrimination of individuals on the basis of their age, race, creed, color, national origin, sexual orientation, gender identity, military status, sex, marital status, disability or other protected basis. As of June 1, 2018, all ESD

contracts must contain a representation that the vendor's policies or practices address harassment and discrimination.

8.4. Compliance with Executive Law Articles 15-A & 17-B: Contractor and Supplier Diversity

Background

All Procurement Contracts must comply with the requirements of Executive Law Article 15-A, which governs the New York State MWBE Program. The purpose of the MWBE Program is to eliminate historic barriers to participation by minority and women-owned business enterprises in State contracting. The MWBE Program contributes significantly to ESD's mission of promoting a growing State economy; encouraging business investment and job creation; and supporting diverse, prosperous local economies across the State. Staff should be familiar with the [MWBE Operations Primer](#) published by the Division of Minority and Women's Business Development to ensure compliance with MWBE-related laws and requirements.

All Procurement Contracts must also comply with the requirements of Executive Law Article 17-B, which acknowledges that SDVOBs strongly contribute to the economies of the State and the nation. Staff should familiarize themselves with the [SDVOB Operations Guidance](#) published by OGS to ensure compliance with SDVOB-related laws and requirements.

ESD staff are expected to encourage the use of MWBEs and SDVOBs in all procurements, including any amendments to existing contracts. Staff must reach out to the Office of Contractor and Supplier Diversity ("OCSD") as early as possible in the procurement process in order to facilitate goal-setting for each contract. Additionally, upon advertising a solicitation for a new opportunity, staff should consider publicly posting a list of State-certified MWBEs or SDVOBs who have expressed interest in subcontracting opportunities in connection with the solicitation. Click here for an example of how to advertise potential opportunities for MWBEs: <http://www.panynj.gov/business-opportunities/pdf/OBDCR-LGA-MWBE-Flyer-16-F4%20.pdf>.

Executive Order Number 162

Pursuant to Executive Order Number 162 ("EO 162"), all New York State contracts, agreements and procurements issued and executed on or after June 1, 2017 require contractors to submit detailed workforce utilization reports that include the job title and gross wages of each employee of a contractor and subcontractor performing work on a State contract either or each employee in the contractor's and subcontractor's entire workforce, if the individuals working directly on a State contract cannot be identified. A State contract includes all agreements in excess of \$25,000 for services and commodities, and all agreements in excess of \$100,000 for construction. Contractors and subcontractors performing work on construction contracts with a total value in excess of \$100,000 are required to submit workforce utilization reports to on a monthly basis, within ten (10) days of the end of that month. Contractors and subcontractors performing work on commodities and service contracts with a total value in excess of \$25,000 are required to submit workforce utilization reports to on a quarterly basis within ten (10) days of the end of that quarter.

Goal-setting

All State contracts exceeding \$25,000 for commodities or services and \$100,000 for construction must be assessed for MWBE & SDVOB goals. For ESD's purposes, a State contract includes commodities procurements, professional services contracts, loans, grants, and leases of real property involving construction, demolition, replacement, and major repairs or renovation.

OCSO is responsible for ensuring ESD's compliance with the MWBE and SDVOB Programs. OCSO works with ESD program staff (project managers, program directors, originators and procurement officers) to determine if a contract is eligible for MWBE and SDVOB goal setting, exempted² from goal setting, or excluded³ from goal setting.

It is important to note that whole projects cannot be assessed for goals; rather individual contracts must be assessed for goals.

OCSO may determine that an MWBE goal below the agency-specific goal of 30% is appropriate because there are limited or no subcontracting opportunities and/or limited or no availability of certified MWBEs to perform or provide specific goods or services. All goals of less than 30% MWBE participation, other than a zero goal determination, must be forwarded to the Executive Chamber for review and must include documentation to reflect the reason for goal reduction.

Waiver Requests

A firm responding to a solicitation or already engaged on an ESD contract, after making good faith efforts to achieve the maximum feasible portion of an MWBE and/or SDVOB participation goal, may submit an [MWBE Waiver Request Form](#) or [SDVOB Waiver Request Form](#) to OCSO with appropriate information documenting its "good faith efforts"⁴ to meet its goals. The waiver process includes reviews by: OCSO and the OCSO Counsel. The Executive Chamber must approve a waiver before it can be issued.

Waivers must be sought even if the overall MWBE goal is met but either the Minority-owned Business Enterprise or the Women-owned Business Enterprise component of the MWBE goal is not met in part or in full.

² "Exemptions" are defined contracts which are excluded from MWBE and SDVOB goal setting. Some examples of exemptions are wages, benefits, and other employee-expenditures; debt service; travel reimbursement; utilities; OGS centralized services; sole source contracts (subject to there being no MWBE or SDVOB available to participate as sub-contractor when subcontracting is appropriate); postage; telephones; operating transfers; certain rentals and repairs; and special departmental charges (i.e. unemployment insurance and tuition reimbursement).

³ "Exclusions" are contracts that either do not have subcontracting opportunities or no availability of certified MWBEs or SDVOBs to perform or provide specific goods or services. In cases where a contract is awarded by a means other than an RFP, including, but not limited to, discretionary purchases and single source contracts, DMWBD/OGS will only grant an exclusion if MWBEs or SDVOBs are solicited to participate as prime contractors or no MWBEs or SDVOBs are available to participate as prime contractors.

⁴ "Good Faith Efforts" are the actions that all contractors must demonstrate to certify they have performed their due diligence to solicit MWBE and SDVOB participation in support of their State contract goals. Good Faith Efforts requirements are outlined in 5 NYCRR §142.7 (MWBEs) and 9 NYCRR § 252.2(n) (SDVOBs).

A waiver of MWBE or SDVOB goals will not be granted unless the contractor has provided documentation of good faith efforts. In addition to completing a waiver request form, the contractor shall also provide OCSD with supporting information including, but not limited to:

- A statement setting forth the basis for the waiver request;
- The names of general circulation, and trade association publications in which certified MWBE/SDVOBs were solicited for the purposes of complying participation goals related to this contract;
- A list identifying the date(s) that all solicitations for certified MWBE/SDVOB participation were published in any of the above publications;
- A list of all certified MWBEs appearing in the [NYS Directory of Certified Firms](#) and all certified SDVOBs appearing in the [OGS Directory](#) that were solicited for purposes of complying with the participation goals;
- Copies of notices, dates of contact, letters, and other correspondence as proof that solicitations were made in writing and copies of such solicitations to all certified MWBEs/SDVOBs;
- Copies of responses to solicitations received from certified MWBEs/SDVOBs;
- Copies of bid prices from all respondents to a solicitation; and
- A description of any contract documents, plans, or specifications made available to certified MWBEs/SDVOBs for purposes of soliciting bids and the date and manner in which these documents were made available.

In the event that a waiver is not granted or approved by one or all of the above parties, OCSD may assess liquidated damages or seek settlement in accordance with the MWBE and/or SDVOB Regulations and the provisions of the contract language.

Where practical, feasible and appropriate, ESD shall promote and encourage participation by MWBEs and SDVOBs in the selection and award of all contracts. Such MWBE and SDVOB participation shall be documented in a regular supplement, prepared by OCSD, for inclusion in the quarterly and annual reports made by Contracts Administration to the Board. To assist in the gathering of this information, the originator must provide OCSD with a completed Utilization Plan of MWBE and, separately, SDVOB Participation, from the potential contract awardee, for OCSD's review and approval, prior to contract award. The required forms are accessible at <http://intranet.empire.internal/Resources/FinanceResources.html> (scroll down to "MWBE/SDVOB/DBE Non-Discrimination and Contractor & Supplier Diversity Forms").

8.5. Compliance with Iran Divestment Act of 2012

Every bid or proposal made to ESD pursuant to a competitive solicitation as provided in these Guidelines must contain the following statement, signed by the bidder or respondent and affirmed as true under penalty of perjury:

"By submission of this bid, each bidder and each person signing on behalf of any bidder certifies, and in the case of a joint bid each party thereto certifies as to its own organization, under penalty of perjury, that to the best of its knowledge and belief that

each bidder is not on the list created pursuant to paragraph (b) of subdivision 3 of section 165-a of the State finance law."

The list in question is maintained by OGS and is available here: <http://www.ogs.ny.gov/about/regs/docs/ListofEntities.pdf>. No bid that fails to certify compliance with this requirement may be accepted as responsive, unless the bidder includes a statement in compliance with the Iran Divestiture Act (contact the Legal Department for guidance in such a case).

8.6. Encouragement of use of New York Businesses as sub-contractors and suppliers.

The Secretary to the Governor has issued a directive that provides that all vendors who anticipate using sub-contractors or suppliers to fulfill procurement contracts must be encouraged (but not required) to use New York State businesses. All procurement solicitations of any kind must include specific language aimed at such encouragement. The model language can be found at http://intranet.empire.internal/Resources/Data/Procurement/03042014_NYS_SubcontractorsandSuppliers.pdf

8.7. Project Sunlight

Project Sunlight is an important component of the Public Integrity Reform Act of 2011. Under this law, State governmental entities specified in the law are required to cooperate with the Office of General Services (OGS) and identify in a database developed by OGS all individuals, firms or other entities (other than State or local governmental agencies) that appear before such entity on behalf of themselves or in a representative capacity on behalf of a client or customer for any of various specified purposes. This includes appearances related to (a) procurement, (b) ratemaking, (c) regulatory matters, (d) judicial or quasi-judicial proceedings, (e) adoption or repeal of a rule or regulation.

Project Sunlight's reporting requirement for procurement appearances applies to those appearances that are for the purpose of procuring a State contract, irrespective of whether there is a governmental procurement planned. Thus, reporting is required for appearances relating to State contracts for which a Restricted Period under the Procurement Lobbying Law has not been established and without regard to whether a governmental procurement is anticipated. Appearances during the Restricted Period—whether they are bid clarification meetings or bid interviews or any other permissible contact under the State Finance Law do not need to be reported. As well as, appearances following the award of a State contract do not need to be reported.

8.8. Publication on ESD Website

Competitive solicitations must be made available on the ESD (and subsidiary, if applicable) website after advertisement in the NYS Contract Reporter. This website is also the appropriate place to post Questions and Answers regarding the procurement.

8.9 Contract Reporter Advertising Process

As stated above, ESD must advertise in the New York State Contract Reporter all contracts for the acquisition of goods and services of \$50,000 or more, unless an exemption is granted. In order to access the online system and place the advertisement, the initiator should contact Contracts Administration.

The minimum time for vendors to respond to a Contract Reporter solicitation is 15 business days (i.e., Saturdays, Sundays and legal holidays are excluded). The Contract Reporter website provides authorized users with a publication calculator tool in order to calculate the earliest due date for a solicitation.

Where practicable, staff members responsible for a proposed Procurement Contract should make reasonable efforts to identify potential vendors in addition to those identified through the Contract Reporter. This may be done by obtaining referrals from other governmental entities that may have similar requirements, reviewing reference directories, mailing solicitation materials to industry associations and/or known vendors and mailing to lists of appropriate MWBEs maintained by OCSD, as well as any appropriate SDVOBs, listed at http://ogs.ny.gov/Core/Docs/CertifiedNYS_SDVOB.pdf.

8.10. Selection Criteria

Written selection criteria shall generally be established for each proposed Procurement Contract and shall be included in any written solicitation materials. The relative weighting of the selection criteria should be set out in the RFP wherever practicable and, in the absence of written weighting, each criterion shall be deemed to have the same weight.

The selection criteria shall generally include price as an important factor to be considered in the selection process; however many ESD procurements are based on "Best Value," which allows for factors other than price to be taken into account. Such factors commonly include the quality of goods and services, the experience of the vendor and specific expertise with respect to the goods or services to be supplied. See also Section 7.1 above if price is weighted at less than 20%.

8.11. Bid Opening Procedures

All proposals should be received by the Procurement Department (unless the Procurements Director directs otherwise), and immediately should be stamped with the date and time of receipt. **Do not open any bid packages for any reason before the formal bid opening.** ESD staff members representing Contracts Administration, Procurements, Legal and the initiating Department/Subsidiary should be present at bid openings in person or by teleconference. Bids shall be opened by the Procurement Director or his/her designee, and the time and date of receipt shall be entered into the Bid Log, which must be signed by all staff members present. Teleconference participants must confirm their presence by email to the Procurements Director. The Bid Log shall also record the presence of SFL 139j-k and ST-220 forms in the bid.

A **Public Bid Opening is required** for Public Works contract solicitations, pursuant to UDC Act § 11 (which incorporates by reference State Finance Law § 135). This section generally covers bids for construction work on public projects, and may include preparatory work such as demolition, asbestos abatement and the like. ESD or a subsidiary must be a party to the contract, which must involve the use of laborers, mechanics or workers (not, for example, architects and engineers). Construction contracts must be awarded to the lowest qualified and responsible bidder. See UDC Act § 11. The definition of a “Public Work” is more a matter of art than law: if in doubt as to whether the contract is for Public Work, contact the Legal Department for guidance.

8.12. Bid Evaluation and Vendor Selection

The initiating Department Head should establish, as early as practicable prior to bid opening, a team of at least three ESD staff members with relevant knowledge and experience of the goods and/or services being procured. One member should come from Contracts Administration or Finance. In some cases, one or more non-ESD team members may join the review team, where those persons have specific knowledge of the procurement subject, or a specific role to play in the administration of the contract with the successful bidder. This involvement of non-ESD persons is appropriate because § 2824 (1) of the Public Authorities Law permits authorities such as ESD to “take into consideration the views and policies of any elected official or body, or other person” in the exercise of its powers and duties, provided that ESD must “apply independent judgment in the best interest of the authority, its mission and the public.” If non-ESD staff is included in the review team, the team must be expanded in number such that a majority will always be ESD staff members.

Analysis of the proposals and/or bids submitted and the award of the contract shall be documented in reasonable detail. Award to anyone other than the low bidder must include in the documentation the reason the low bidder was not selected.

In reviewing bids, all members of the team must complete and sign scoring sheets that rate each bidder according to the selection criteria and weighting set out in the RFP. Scoring sheets must not include anything other than numerical ratings (i.e., no comments/opinions/notes, etc). Original scoring sheets must be signed and retained by the Procurements Director as part of the Procurement Record.

8.13. Determination of Responsibility – “CLIP Review” and the VendRep form

Pursuant to State Finance Law § 139-j(7), ESD or the Subsidiary Board must determine that a vendor or respondent is a responsible contractor, prior to approving the award of a contract. In any event, whether or not a formal Determination of Responsibility is sought from the relevant Board, the initiator should ensure that all vendors are “responsible.”

There are two methods of ascertaining vendor responsibility:

- “CLIP” review. This review involves an assessment of responsibility in four categories:

Category	Factors to be considered include, but not are limited to:
Financial and Organizational Capacity	Assets, liabilities, recent bankruptcies, equipment, facilities, personnel resources and expertise, and proper auditing and accounting controls.
Legal Authority	Authority to do business in New York State, licenses, and registrations.
Integrity	Criminal indictments or convictions, civil fines and injunctions imposed by other agencies, anti-trust investigations, ethical violations, tax delinquencies, or debarment by federal, State or local governments.
Previous Contract Performance	Reports of less than satisfactory performances, early contract termination for cause, contract abandonment, court determinations of breach of contract.

For all procurements, the initiator must submit a memo to the Procurements Director attesting that the initiator conducted a CLIP review and finds the vendor to be responsible and indicating what steps were taken to make that determination. View [Determination of Responsibility form](#). In addition to consulting the resources listed on the Determination of Responsibility form, staff may find it useful to consult OSC's list of suggested resources, at <http://www.osc.State.ny.us/vendrep/webresources.htm>, or review OGS's bulletin of [best practices](#) for determining vendor responsibility.

CLIP review is not needed for procurements from the OGS Centralized Contracts list.

- The OSC VendRep Questionnaire, which should be used wherever possible and is required for all purchases of \$100,000 or more. This form seeks information about the vendor, its affiliates and subsidiaries, officers and owners, past responsibility determinations by agencies and investigations/prosecutions. It must be notarized, and false statements may be actionable and in some cases may be criminal. The VendRep forms for different types of vendors can be accessed here: www.osc.state.ny.us/vendrep/webresources.htm.

If a vendor is considered to be non-responsible, steps must be taken to afford the vendor due process rights, including an opportunity to explain its position in writing and, in some cases, at a meeting. Consult the ESD Legal Department in such cases, after having reviewed the information at <https://nyspro.ogs.ny.gov/sites/default/files/uploaded/OSCBestPracticeforVendorResponsibility.pdf>.

8.13.1. Cancellation of a Solicitation

On occasion, the competitive solicitation process does not yield any satisfactory responses and ESD wishes to pursue other methods of procurement. To notify the public that ESD has cancelled a solicitation, the initiator should (1) inform all respondents via phone call (which

should be documented for the procurement record), letter or email of the cancellation and (2) publish or post notice of the cancellation in each place that the solicitation was published (usually the Contract Reporter and the ESD website) for no less than 2 weeks. If the decision is made to re-advertise the opportunity, the project team should scrutinize the initial solicitation document to determine whether any restrictions can be lifted or the document can otherwise be revised to produce better results.

8.14. Procurement Record

The initiator shall be responsible for creating and maintaining a record of the procurement process. Such record shall contain documentation related to the procurement process, any competitive solicitation exemption, proposals and/or bids received, scoring sheets, vendor responsibility documentation and other documents prepared or used by the bid reviewers in their vendor selection process. Note that final scoring sheets must be sent to the Procurements Director before a contract is executed.

9. Contract Approval

Procurement Contracts in amounts of **\$250,000 and under** that will be completed within one year (for services contracts) must be approved by the Officer(s) specified in Attachment A to these Guidelines. Board approval is not required for these contracts, but contracts **between \$50,000 and \$250,000** (or for subsidiaries, whatever the board approval threshold is) must be approved by the President of the ESD (or subsidiary) Board or his or her designee.

Procurement Contracts priced at **over \$250,000**, as well as contracts for any amount involving personal services to be rendered over a period in excess of one year, must be approved by the ESD (or subsidiary) Board.

Note that **warranty and product maintenance/support/lease contracts (including but not limited to auto and equipment leases and software support services)** are not considered personal service contracts and do not require approval by the Board unless the amount of the contract is over \$250,000 in aggregate through its term. All contracts with a technology component must be approved by ESD's Information Security Officer or designee prior to execution or Board approval.

9.1. Board Materials

The initiator writes a memorandum from the respective Department Head to the Officer(s) specified in Attachment A to these Guidelines, explaining the need for the contract. View [Model Directors' Materials for Procurement Contracts](#) (these materials can also be used for obtaining approval of the President or his or her designee by adding a [CEO/Designee Approval Cover Memo](#)).

The Board materials must set out:

- a. the need for goods and services;
- b. a brief description of the goods or services needed;
- c. the expected maximum cost of the proposed goods or services;
- d. the selection process used to determine an award based on best value, or where not quantifiable, the justification which demonstrates the best value will be achieved; and
- e. the funding source.

9.2. ESD Contract and Amendment Approval

- a. If staff anticipates that a contract may need to be extended beyond one year, ensure that Board approval is requested and that the materials and resolution specifically permit an extension of the contract. Once Board approval is obtained, the contract with the vendor must contain a clause that specifically permits extension. If the contract does not contain such a clause, and the contract needs to be extended, Contract Reporter advertising is required unless an exemption is granted.
- b. Contracts for services to be rendered over a period in excess of one year, regardless of the amount of the contract, which must have been approved by the Board, must in addition be reviewed annually by the ESD (or subsidiary) Directors, pursuant to Public Authorities Law § 2879.3(b)(ii). The initiating Department Head must provide an annual report setting forth the status of all continuing services contracts, together with justification for the continuance of such contracts for the next year. This annual status report can be made to Contracts Administration by filling out a contract summary/contract status report. The annual status reports will thus serve to clarify the need to continue existing multi-year service provider contracts. Note also that warranty and product maintenance/support/lease contracts (including but not limited to auto and equipment leases) are not considered personal service contracts.
- c. Contract documents should be fully executed and delivered by both parties prior to the commencement of any work. However, if in the discretion of the initiating Department Head it is essential that work on the contract be commenced before the formal contract documents have been approved, and before Board or President approval if required, the officer named in Attachment A to these Guidelines may issue a letter authorizing a contractor

to commence work pending completion and execution of formal contract documents (“**Notice to Proceed**”), provided that:

- i. the contract is not subject to OSC approval (See Section 10.5); and
- ii. the authorization contained in the Notice to Proceed is (a) \$250,000 or less and (b) does not exceed 20% of the total contract value; and
- iii. the initiating Department Head seeking the Notice to Proceed obtains in advance, via memorandum (with copies sent to Contract Administration and Procurement) an explanation in reasonable detail the need for the immediate commencement of contract performance, and the written authorization of the Officer(s) specified in Attachment A to these Guidelines.

An NTP template is available [here](#).

d. Contract Amendments

- i. **Amendments to existing contracts** follow the same process as new contracts, i.e., any amendment over \$50,000 needs to be advertised in the Contract Reporter, exempted, or awarded to a firm on a pre-qualified list after soliciting bids from three other firms including at least one MWBE firm and one SDVOB firm. An Amendment Package must be sent to Contracts Administration for approval and processing (see Commitment Request Package on the next page for guidance). The same documents, such as justification memo/contract status report, commitment request form and/or standard amendment form must be generated. If the proposed amendment will involve a new Contract Reporter advertisement or other solicitation, the requirements of SFL §139-j and 139-k and State Tax Law § 5-a will apply, and in any case, new certifications may be required. Note that an amendment to an existing contract that causes the aggregate amount of the contract to exceed \$1 million may be subject to OSC approval, regardless of the amount of the amendment and source of funds.
- ii. Amendments that increase the **contract amount** to more than \$250,000 must be approved by the ESD (or subsidiary) Directors. Amendments for less than 10% of the original contract amount (or the contract amount as subsequently approved by the Board) may be executed by the ESD officer named in Attachment A to these Guidelines without further Board approval, unless the amendment increases the contract to an amount above \$250,000 and Directors’ approval has not been previously obtained.

- iii. If a proposed amendment to a contract for personal services will increase the term of the contract to more than one year, Board approval is necessary, and Contract Reporter advertising is necessary unless (i) as discussed in paragraph (a) above, the original contract contained a clause specifically permitting extension; or (ii) the amendment is awarded to a vendor on a pre-qualified list following wherever practicable the receipt of three quotes from other vendors on the list including at least one from a certified MWBE or SDVOB firm. If the amendment will increase the amount of time or other terms of the contract but will not increase the contract amount, the initiator need not submit a new Commitment Request Package.
- iv. In the case of contracts for more than \$1 million, where the initiator anticipates that unforeseen contingencies and changes of scope may arise and require changes in the contract amount, Board approval should be sought from the outset for amendment of the contract up to 10% of the amount approved, to be executed without further Board approval by the Chief Executive Officer and the Chief Financial Officer of the corporation. Note that such an amendment may require OSC review and approval (see section 10.5). If in doubt, consult the Legal Department.

Example A: Original contract for \$100,000 was awarded competitively. The initiator wishes to amend the contract for an additional \$5,000. Because the amendment is for less than \$50,000 it does not require advertisement/exemption, and because it will not increase the total contract amount to more than \$250,000* and is less than 10% of the original contract amount, it does not require Board approval. This example also assumes that the amendment will not extend personal services beyond one year, and so will not require Board approval.

*Some subsidiaries have lower monetary thresholds for board approval.

Example B: Original contract for \$40,000 was awarded via purchase order. Due to unforeseen circumstances, the initiator wishes to amend the contract for an additional \$20,000. Because the amendment is less than \$50,000, it too can be procured via purchase order. However, staff should carefully examine future needs to avoid repeated awards of small noncompetitive amendments.

Example C: Original contract for \$5 million was awarded competitively and approved by the Board. The initiator wishes to amend the contract for an additional \$300,000. Because the amendment is less than 10%, and the contract has previously been approved by the Board, no further Board approval is necessary, but Contract Reporter advertising (or exemption) is still necessary.

Example D: Original contract for \$100,000 was awarded to a firm on a Board-approved pre-qualified list. The initiator wishes to amend the contract for an additional \$50,000 and extend the term beyond one year. Because the amendment will extend the contract term beyond one year, Board approval is necessary. However, because the firm was pre-qualified through a competitive process, no further Contract Reporter advertising is necessary (but the initiator should solicit bids from three other firms on the list where practicable, including at least one MWBE and one SDVOB).

10. Steps After Contract Approval Is Obtained

10.1. Commitment Request Process (for contracts of \$50,000 or more)

- a. The contract initiator should assemble a Commitment Request Package containing the following documents:
 1. A completed [Commitment Request Form](#).
 2. A [Contract Summary/Justification Memorandum](#) explaining the need for the procurement and the method of procurement used.
 3. One (1) completed original of the [Standard Form Contract - Short Form for Goods/Services](#) or [Standard Form Amendment or Modification of Contract](#) with: (i) Schedule A (conditions applicable to procurements of goods/services or legal services); (ii) Schedule B (Participation By Minority and Women-Owned Business Enterprises: Requirements and Procedures); (iv) Schedule B-1 (Participation by Service-Disabled Veteran-Owned Businesses with Respect to State Contracts); (v) Appendix A (ST-220 Contractor Certification Form pursuant to Tax Law § 5-a); (vi) Appendix B (Compliance with SFL § 139-j and 139-k, the Offerer's Affirmation of Understanding and Agreement pursuant to SFL §139-j; and (vii) Appendix C (Offerer Disclosure of Prior Non-Responsibility Determinations under SFL § 139-k).

Remember that the provisions and the requirements of the proposed contract must be specific and stated in clear and unambiguous terms so they are fully understood by the contracting parties. It is important that the contract clearly specify what is expected of both the contractor and ESD, and the method of payment to the contractor. The more clear and specific the contract, the easier it will be to monitor.

The terms of the contract should include, but not be limited to:

- the scope and purpose of the contract;

- the description of the services to be performed;
 - the location where the work is to be performed;
 - the standards to be used to measure performance (e.g. units of services, number and nature of clients served, target dates, etc.);
 - the level of expertise that is required to perform the tasks, the cost and the method payment of the contract;
 - the projected starting date and the contract period;
 - the finished product or the services to be delivered;
 - record-keeping and reporting requirements, including a statement that ESD and any relevant State agency has the right to audit the contractor's records;
4. Written explanation of the responsibility determination/CLIP review. View [Determination of Responsibility form](#). For contracts valued at \$100,000 or more, staff must also submit a VendRep Form completed by the vendor.
 5. ESD/Subsidiary Board of Directors or CEO/designee approval, if applicable. View [sample Board materials](#) and [CEO/Designee Approval Cover Memo](#).
 6. Depending on the procurement method used: (i) the Contract Reporter advertisement and posting of bid results and internal approval to advertise and the scoring sheet/bid opening log; or (ii) an approved exemption letter; or (iii) the OGS Centralized Contract; or (iv) a copy of the relevant Board-approved prequalified list.
 7. All appropriate insurance certificates, as approved by the ESD Insurance Administrator, a copy of the appropriate officer's approval and a copy of the RFP, if applicable. Note that all contractors must have evidence of Workers' Compensation and Disability Insurance coverage.
 8. A completed [Commitment Package Checklist](#).
- b. The initiator signs and obtains the Department Head approval on the Commitment Request form and forwards the commitment package (all documents listed above) to Procurement for compliance review and approval. When approved, Procurement will route the commitment package to Contract Administration.
 - c. Contract Administration routes and tracks the commitment package and obtains necessary approvals from various ESD departments.

- d. Upon obtaining in-house approvals, Contract Administration sends all three (3) sets of the contract or amendment package to the vendor for signature(s).
- e. After receiving three (3) signed sets from the vendor, Contract Administration sends all three sets to the Officer(s) specified in Attachment A to these Guidelines for signature.
- f. One original copy of the fully-executed contract or amendment is sent by Contract Administration to the vendor.

10.2. Contract Reporter Award Notification

A contract is considered awarded when it is executed (signed) by all parties. If a contract is awarded after a Contract Reporter Solicitation, the award, along with the Schedule of MWBE and SDVOB Participation (and/or Disadvantaged Business Enterprise Participation, where applicable), must be posted on the Contract Reporter system. This posting will be done by Contracts Administration.

10.3. [INTENTIONALLY OMITTED]

10.4. Department of Budget (“DoB”) Approval

Under DOB Bulletin B-1184, approval for certain procurements over \$500 is required. In general, if a State or legislative appropriation is the source of funds, approval is needed. A web-based application known as the “Agency Spending Controls Application” process is used to obtain prior approval. DOB approval is not required when the funding source for the procurement comes from a non-State source (e.g., a developer of an ESD project), where at least 75% of the procurement cost will be reimbursed by federal funds, or when the procurement is needed to address an immediate threat to public health and/or safety. DOB mandated forms are used in cases where approval is required. ESD has implemented the cost control measures described in Bulletin B-1184. All spending not involving Federal reimbursement of at least 75 percent, presenting an immediate threat to public health and/or safety or whose funding source is from a Third Party is subject to the preapproval process specified in the Budget Bulletin utilizing forms established by DOB known as Attachment A. An Attachment B form was also created for spending involving Federal reimbursement of at least 75% or presenting a public health and/or safety issue.

For instructions and forms, see the ESD Employee Intranet: [Financial Resources](#). If in doubt, contact the ESD Controller’s Department for guidance.

10.5. OSC Jurisdiction Over Contracts in Excess of \$1 Million

Under Public Authorities Law § 2879-a (effective March 1, 2010), ESD must make certain communications to OSC about certain types of contracts valued at more than one million dollars. OSC has issued final regulations implementing this law, and OSC approval shall be deemed part

of these Guidelines. A memorandum explaining the application and procedures involved in OSC approval has been circulated to all relevant staff and may be viewed [here](#).

“Eligible Contracts” are contracts in excess of one million dollars that are either: (i) to be paid for in whole or in part by State appropriations; or (ii) noncompetitively awarded (regardless of the funding source).

“Eligible Contract Amendment” is any modification to (A) an Eligible Contract; or (B) a contract executed after March 1, 2010 where the value as amended is in excess of \$1 million where (i) the contract as amended will be funded in whole or in part by State appropriations; or (ii) the contract was originally awarded noncompetitively; or (iii) the contract was originally awarded competitively but the modification was “neither contemplated nor provided for” in the original solicitation (i.e, new scope).

- ESD must annually report to OSC all Eligible Contracts/Amendments that it anticipates in the next fiscal year, and revise such report within 30 days of learning of any significant changes to the annual report.
- ESD must give OSC 10 days’ notice before (i) publishing a solicitation that ESD expects will result in an Eligible Contract/Amendment that was not previously reported to OSC or (ii) executing a noncompetitive Eligible Contract/Amendment that was not previously reported to OSC.
- ESD must file all Eligible Contracts/Amendments that are not subject to OSC approval (see following paragraph) with OSC within 60 days of execution.

Certain Eligible Contracts/Amendments that are the subject of a written notice must also be approved by OSC within 90 days after the contract is signed. A list of active written notices can be viewed [here](#). If approval by OSC has not been obtained, the signed contract “shall not be a valid enforceable contract.”

All submissions to and communications with OSC are to be handled by Contracts Administration only. Submit nothing to OSC directly.

OSC has confirmed that contracts for the sale of real property for an amount over \$1 million are covered by the Property Disposition Guidelines and are not subject to OSC review and approval under PAL § 2879-a.

12. Monitoring of Procurement Contracts

Performance of Procurement Contracts must be monitored by the initiating Department to ensure that the scope of work or services to be provided are being/have been performed; that use of ESD personnel, supplies and facilities is documented; that the MWBE and SDVOB requirements, as provided by OCSD, are being met; and that the established starting and completion dates for major components of the contract are being/have been met.

ESD employees assigned the responsibility of monitoring the work should be familiar with the type of work being performed and with the specific terms of the contract, including MWBE and SDVOB participation goals.

The frequency and manner in which the vendor's performance will be monitored should be clearly stated to the vendor and directly related to the terms of the contract.

Written documentation pertaining to vendor performance, such as progress reports, site visit reports, payment and expenditure data, memoranda of verbal discussions, MWBE and SDVOB utilization plans and written correspondence should be maintained and reviewed by the initiating Department.

Periodic visits to the work sites should be made where appropriate to review work in progress and work completed. Site visit reports should be completed and include the observations of pertinent matters, such as the number and type of persons employed by the vendor, adequacy of the facilities and equipment, and quality of performance, including any deficiencies in the performance of the work, which may have an impact on satisfactory completion of the project.

The evaluation of the vendor's performance should take into consideration the quantity and quality of the work performed; the timeliness of submission of contract deliverables; the adequacy of cost and performance records and other supporting documentation; the ability of the vendor to meet MWBE and SDVOB participation goals; and whether the extent of performance, to date, is commensurate with the amount the contractor has been paid.

All MWBE and SDVOB performance should be reported to OCSD.

Performance that is below expectations or established standards should be reported to ESD management immediately. All deficiency reports should be specific and in writing. Management should review deficiency reports and take appropriate action, which may include termination of a contract.

All invoices presented for payment should be reviewed by the person who is monitoring the contract and approved by the respective Department Head. No payment should be made unless the work is satisfactory and in accordance with the terms of the contract. Approval on the Payment Authorization form attests to this. ESD's prompt payment procedures can be found at 21 NYCRR 4214.3, available [here](#).

13. Ethical Considerations

13.1 Procurement Contracts Involving Former Employees of ESD

Public Officers Law § 73 and ESD's [Ethics Policies](#) impose restrictions on former ESD officers and employees deriving compensation from ESD contracts or appearing before ESD. Accordingly, evaluation team members should carefully review lists of all proposed staff

submitted by vendors to identify any former ESD employees. If a former ESD employee is identified, review his/her employment history to ensure it is appropriate and allowable. Direct any questions to the ESD Ethics Officer.

13.2 Conflicts of Interest

All actions of ESD staff, including but not limited to procurement, are subject to ESD's Ethics Policies and the provisions of Public Officers Law §§ 73 and 74. Evaluation team members should ensure that they do not have any conflict of interest with respect to any bidder, and should alert the ESD Ethics Officer immediately upon identifying any potential conflict. For particularly large or complex solicitations, especially where outside consultants are assisting with the evaluation process, the project team should consider having each member of the evaluation team complete an [Evaluation Conflict Disclosure Statement](#). Procurement counsel can advise on how to use this form.

13.3 Unfair Advantage Prohibited

Firms that develop or draft specifications, requirements, statements of work, or requests for bids or proposals for a procurement must be excluded from competing in any resulting procurement.

14. Implementation of These Guidelines

ESD's Legal Department, in conjunction with the Procurement/Contract Administration Department, shall be responsible for:

- a. Preparing for approval by the CEO such supplemental procedures as may be required to effectively implement these Guidelines.
- b. Preparing proposed amendments to the Guidelines for approval by the CEO and the ESD Directors when and as required.

15. Reporting

15.1. Annual Reports

Annually, ESD's VP/Contract Administration shall prepare for the Directors' review a report on Procurement Contracts as of the end of each fiscal year, summarizing procurement activity by ESD for the period of the report, including a listing of all contracts entered into, the selection process used to select vendors, the status of existing Procurement Contracts and required Schedules of MWBE Participation. ESD's VP/Contract Administration shall also prepare, on an annual basis, a report for submission to:

- a. The Division of Budget;
- b. The Department of Audit and Control;

- c. The Senate Finance Committee;
- d. The Assembly Ways and Means Committee;
- e. Members of the public (upon receipt of reasonable requests therefor); and
- f. The Commissioner of Economic Development.

The reports shall include these Guidelines, any amendments thereto, and an explanation of the amendments.

16. Effect on Awarded Contracts

Nothing contained in these Guidelines shall be deemed to alter, affect the validity of, modify the terms of, or impair any contract or agreement made or entered into in violation of, or without compliance with, these Guidelines. These Guidelines reflect best and customary practice, but are not intended to be rules of law. Note, however, that certain contracts may not be “valid or enforceable” without OSC approval. (See Section 10.5)

Item I. C.



FOR CONSIDERATION

April 10, 2018

TO: The Directors

FROM: Howard A. Zemsky

SUBJECT: BROOKLYN ARENA LOCAL DEVELOPMENT CORPORATION – Delegation of Authority to Enter into Contracts

REQUEST FOR: Delegation of Authority to Sign Contracts Not to Exceed \$100,000

I. BACKGROUND

Currently only the Board of Directors (the “Directors”) of the Brooklyn Arena Local Development Corporation (the “Corporation”) has the power to enter into any contract. The contract procurement process for goods and services involves compliance with multiple procedures, including confirming Board approval of each contract. The scheduling and formality of a full board meeting is necessary. Delegating authority to an officer of the corporation to approve contracts up to a specified amount could help expedite finalizing contracts. The New York State Urban Development Corporation d/b/a Empire State Development (“ESD”) has adopted a delegation of authority to the President of ESD and the Corporation’s Directors are being asked to adopt substantially the same delegation.

II. PROPOSAL

It is proposed that the Directors delegate authority so that only contracts over \$100,000 would require approval by the Directors. The authority to enter into contracts not to exceed \$100,000 would be delegated to the President and Chief Executive Officer or his designee(s), who shall be one or more officers of the Corporation designated by the President and Chief Executive Officer.

With regard to contractual arrangements (including, without limitation, procurement of services and loan documents) resulting in the disbursement of funds or the incurrence of future liabilities, the following guidelines would be used:

1. Single contracts with total expenditures over \$100,000 must be approved by the Directors even if annual payments may be less than \$100,000.

2. Where a single project is expected to result in a disbursement of funds in excess of \$100,000, the transaction must be approved by the Directors even if individual contractual agreements comprising the total project are under \$100,000.
3. Contract amendments or change orders that increase an original contract amount from less than \$100,000 to more than \$100,000 must be approved by the Directors. Furthermore, all amendments to contracts originally over \$100,000 must be approved by the Directors unless their original authorization allowed for price adjustments.
4. Contracts involving services to be rendered over a period of more than one year must be approved by the Directors, regardless of the amount of the contract.

III. RECOMMENDATION AND REQUESTED ACTION

The Directors are requested to delegate authority to the President and Chief Executive Officer or his or her designee(s), who shall be officers of the Corporation, to enter into contracts up to \$100,000; make all findings required by applicable laws; and take all such other actions as may be necessary or appropriate in connection with the approval, execution and implementation of such contracts.

IV. ATTACHMENTS

Resolution

April 10, 2018

BROOKLYN ARENA LOCAL DEVELOPMENT CORPORATION - Delegation of Authority to
Enter into Contracts - Delegation of Authority to Sign Contracts Not to Exceed \$100,000

BE IT RESOLVED, that in accordance with the materials presented to this meeting, a copy of which is hereby ordered filed with the records of the Corporation, the President and Chief Executive Officer or his or her designee(s), who shall be one or more officers of the Corporation, and each of them hereby is, authorized to enter into contracts, including, without limitation, procurement of services and loan documents, in amounts not to exceed \$100,000, on behalf of the Corporation with such persons, firms and corporations as he or she may deem necessary to exercise the powers, duties and functions of the Corporation as prescribed by law, and to make all findings required by applicable laws, and to take all such other actions as may be necessary or appropriate in connection with the approval, execution and implementation of such contracts; and be it further

RESOLVED, that the President and Chief Executive Officer shall, from time to time, advise the Directors of contracts which have been entered into pursuant to this authority.

* * *

Item I. D.



FOR CONSIDERATION

April 10, 2018

TO: The Directors

FROM: Howard A. Zemsky

SUBJECT: BROOKLYN ARENA LOCAL DEVELOPMENT CORPORATION - Pre-Qualified Lists of Underwriters, Financial Advisors and Counsel

REQUEST FOR: Authorization to Adopt the New York State Urban Development Corporation d/b/a Empire State Development's Pre-Qualified Lists of Underwriters, Financial Advisors and Counsel

I. INTRODUCTION

This action seeks adoption by the Brooklyn Arena Local Development Corporation (the "Corporation") of the New York Urban Development Corporation d/b/a Empire State Development ("ESD") pre-qualified lists of underwriters, financial advisors and legal counsel which would make these firms available for future recommendation to the Corporation's Board of Directors (the "Directors") for retention as the need may arise, without need to conduct a further solicitation.

With respect to underwriters and financial advisors, in 2016 ESD adopted a pre-qualified list of underwriters and financial advisors, as detailed below, and the Directors are being requested to adopt that list.

With respect to counsel, in 2016 the Corporation adopted ESD's pre-qualified list of legal counsel, the term of which has expired. ESD adopted a new pre-qualified list of legal counsel, as detailed below, and the Directors are now being requested to adopt that list.

No individual firm is being recommended at this time for retention in connection with any particular matter and no funding is being authorized. Rather, only a pre-qualified list of underwriters, financial advisors and legal counsel is being approved. This would allow staff to select and recommend retention of a firm from among the candidate firms, in connection with particular projects, without the need for conducting individual solicitations in each instance. This will save for each project the two or more months that is normally needed to conduct a solicitation, perform the necessary review and formulate a recommendation.

II. SELECTION OF UNDERWRITING AND FINANCIAL ADVISORY FIRMS

On April 19, 2016, ESD placed an advertisement in the *New York State Contract Reporter* to solicit responses to its Request for Proposals ("RFP") from firms interested in qualifying to serve as underwriters on a rotating basis and as financial advisors. In addition, ESD twice placed an advertisement in *The Bond Buyer* regarding this RFP; posted the RFP on its website; and emailed the RFP to more than 150 representatives of 52 firms.

On June 1, 2016, 45 firms responded to the RFP with several firms applying for more than one position. Thirty-seven firms requested to serve as underwriter and four requested to serve as financial advisor. ESD also received four proposals requesting to be considered only as a member of the Selling Group. A total of firms 13 certified as Minority and Women-Owned Business Enterprises ("MWBE") and three firms certified as Service-Disabled Veteran-Owned Business ("SDVOB") responded to the RFP.

Based upon review of all relevant criteria, ESD staff selected a list of underwriters and financial advisors to remain in effect for two years, with options to renew for two additional years. On August 18, 2016, a team consisting of thirty-six underwriters and four financial advisors were selected by the ESD Board of Directors.

A. UNDERWRITERS

Staff from ESD Treasury, Portfolio Management, Legal and the Office of Contractor & Supplier Diversity reviewed and rated the firms requesting to serve as underwriters. Rating criteria included:

- Experience of firm and individuals
- Historic performance including competitive bond sales participation
- Innovations, ideas, analyses or work provided to ESD and New York State
- Bond sales; retail and institutional distribution
- Commitment to public finance; capital structure

On the basis of overall rankings of the proposals from the responding firms, the recommended group is comprised of 13 Senior Managers and 23 Co-Managers.

The composition of the Selling Group may change from time to time. These firms will receive no designations, assume no liability for purchasing bonds and will only sell bonds of the Corporation as requested and as available.

On occasion ESD has invited selected MWBE firms and emerging or small regional firms in the Co-Manager category to serve as Co-Senior Managers; Corporation staff propose to continue and expand this practice to include SDVOB firms for the Corporation. This invitation will be based on a firm's underwriting performance, including demonstrated support of ESD and the Corporation. As in the past, it is hoped that this practice will provide these firms an opportunity to gain experience and allow for greater participation and compensation.

Given the continuing instability in the financial markets which has seen certain firm mergers, acquisitions and consolidations, in the event that underwriting firms are acquired, merged or otherwise reconstituted, the new or reconstituted firm may be allowed to take the place held by the former firm. Throughout the term, staff will evaluate the performance of underwriters and, if necessary, will make suggestions to the Directors concerning slate composition.

Based on the foregoing reviews and appraisals by ESD, it is recommended that the firms set forth in Exhibit A (attached) be approved by the Corporation to serve as underwriters for two years; it is also recommended that authority be granted to the Corporation's Chief Financial Officer ("CFO") or Treasurer to extend the term for one year and that the President and Chief Executive Officer ("CEO") can further extend the term for an additional year so as to be co-terminus with the ESD list.

B. FINANCIAL ADVISORS

Four firms submitted proposals to serve as financial advisors. ESD staff ranked the responding firms based on the following criteria:

- Firm / individuals experience
- New York State or comparable bond issuance experience
- Recommendations / Innovations
- Additional factors

On the basis of overall ESD staff ranking of the proposals, it is recommended that the Corporation select the firms set forth in Exhibit A (attached) to be eligible to serve as financial advisors, as needed, for a term of two years. It is also recommended that authority be granted to the Corporation's CFO or Treasurer to extend the term for one year and that the President and CEO can further extend the term for an additional year so as to be co-terminus with the ESD list.

III. ADOPTION OF PRE-QUALIFIED LIST OF COUNSEL

On June 27, 2016, ESD staff placed an advertisement in the New York State Contract Reporter requesting proposals from law firms in the following of law (including, in each instance, litigation capabilities): (1) real estate and land use; (2) construction; (3) environmental; (4) condemnation; (5) bankruptcy; (6) taxation; (7) bond financing; (8) foreclosure; (9) employment; (10) transactional direct and indirect investments; and (11) regulatory litigation. Proposals were due by July 22, 2016.

Seventy-eight (78) firms responded to the solicitation. The responses were evaluated by a Review Committee consisting of seven ESD attorneys, including the attorneys responsible for environmental, litigation, contractor and supplier diversity, and employment matters and the

Deputy General Counsel. The ESD's Board of Directors approved this new Pre-Qualified Counsel List on February 16, 2017, which is to remain in effect until the first meeting of the Directors of ESD occurring in March 2020 or, in the discretion of the ESD General Counsel, until the meeting of the ESD Directors first occurring in March 2021.

On the basis of overall ESD staff analysis, ranking of the proposals and the approval by the ESD Board of Directors, it is recommended that the Corporation select the law firms set forth in Exhibit B (attached) to be eligible to serve as legal counsel, for a term to be co-terminus with the ESD list, as needed.

IV. ENVIRONMENTAL REVIEW

Staff has determined that the proposed authorization constitutes a Type II action as defined by the New York State Environmental Quality Review Act and the implementing regulations for the New York Department of Environmental Conservation. No further environmental review is required in connection with this authorization.

V. REQUESTED ACTION

At this time the Board of Directors is requested to: (i) approve the lists of pre-qualified underwriters and financial advisors as set forth in Exhibit A (attached); and (ii) approve the list of pre-qualified law firms as set forth in Exhibit B (attached).

V. NON-DISCRIMINATION AND CONTRACTOR & SUPPLIER DIVERSITY

Pursuant to New York State Executive Law Articles 15-A and 17-B, ESD recognizes its obligation under the law to promote opportunities for maximum feasible participation of certified minority and women-owned business enterprises (MWBEs) and Service-Disabled-Veteran-owned Businesses (SDVOBs) in the performance of ESD projects. ESD's Non-Discrimination and Contractor & Supplier Diversity policies will apply. The Firms shall be required to use Good Faith Efforts (pursuant to 5 NYCRR §142.8 and 9 NYCRR§ 252.2(m)) to achieve MWBE and SDVOB Participation. Specific goals related to the total value of ESD's funding will be established on a project by project basis.

VI. RECOMMENDATION

Based on the foregoing, I recommend approval of the requested action.

VIII. ATTACHMENTS

Resolution

Exhibit A: Pre-Qualified List of Underwriters and Financial Advisors

Exhibit B: Pre-Qualified List of Legal Counsel

April 10, 2018

BROOKLYN ARENA LOCAL DEVELOPMENT CORPORATION – Pre-Qualified Lists of Underwriters, Financial Advisors and Legal Counsel - Authorization to Adopt the New York State Urban Development Corporation d/b/a Empire State Development Lists of Underwriters, Financial Advisors and Legal Counsel; and Authorization to Take Related Actions

WHEREAS, the Brooklyn Arena Local Development Corporation (the "Corporation") proposes to select a team of underwriters and financial advisors (the "Financial Firms"); and

WHEREAS, New York Urban Development Corporation d/b/a Empire State Development ("ESD") issued a Request for Proposals ("RFP") to select a group of Financial Firms to serve ESD and on the basis of the overall ranking of the proposals by the responding Financial Firms, selected qualified Financial Firms; and

WHEREAS, the Corporation proposes to select a team of law firms (the "Law Firms") for all matters related to the Corporation; and

WHEREAS, ESD issued an RFP to select a group of law firms to serve ESD and, on the basis of the overall ranking of the proposals by the responding law firms, selected qualified Law Firms; and

WHEREAS, based on ESD's evaluation of such Financial Firms and Law Firms, the Corporation wishes to adopt the same list of Financial Firms and Law Firms; now,

BE IT RESOLVED, that on the basis of the materials presented to this meeting, a copy of which is hereby ordered to be filed with the records of the Corporation, the Financial Firms, listed in Exhibit A be and each hereby is, approved in the various areas of expertise, such approval to remain in effect until the termination or expiration of the pre-qualified ESD list of Financial Firms; and may it be further

RESOLVED, that the Law Firms, listed in Exhibit B be and each hereby is, approved as pre-qualified legal counsel in the various areas of expertise (and, in each case, related litigation) and in such other areas as the General Counsel or, in the absence of the General Counsel, the Deputy General Counsel, may in his or her sole discretion deem appropriate or advisable in connection with any particular project or matter, such approval to remain in effect until the termination or expiration of the pre-qualified ESD list of Law Firms; and may it be further

RESOLVED, that the President and Chief Executive Officer and his or her designee(s) be, and each of them hereby is, authorized and directed, in the name and on behalf of the Corporation to execute and deliver any and all documents and to take all such actions as may be necessary or appropriate to effectuate the foregoing. Any actions previously taken by the

Corporation consistent with this authorization are hereby ratified and affirmed.

* * *

Exhibit A

Pre-qualified underwriters and financial advisors adopted by ESD Board on August 18, 2016.

Adopted by Brooklyn Arena Local Development Corporation Board on April 10, 2018.

1. UNDERWRITERS

Senior Managers:

Barclays Capital Inc.
Citigroup Global Markets Inc.
Goldman, Sachs & Co.
Jefferies LLC
J.P. Morgan Securities LLC
Loop Capital Markets LLC
Merrill Lynch, Pierce, Fenner & Smith (Bank of America / Merrill Lynch)
Morgan Stanley & Co. LLC
Raymond James & Associates, Inc.
RBC Capital Markets, LLC
Samuel A. Ramirez & Co., Inc.
Seibert Brandford Shank & Co. LLC

Wells Fargo Bank, N.A.

Co-Managers:

Alamo Capital
Academy Securities, Inc.
Blaylock Beal Van, LLC
BNY Mellon Capital Markets, LLC
Cabrera Capital Markets, LLC
Drexel Hamilton, LLC
Fidelity Capital Markets, a division of National Financial Services LLC
First Tennessee Bank N.A., DBA FTN Financial Capital Markets
Great Pacific Securities
Janney Montgomery Scott LLC
KeyBanc Capital Markets Inc.
M&T Securities, Inc.
Mesirow Financial, Inc.
Mischler Financial Group, Inc.
Oppenheimer & Co. Inc.
Piper Jaffray & Co.
Rice Securities LLC
Roosevelt & Cross Incorporated
Robert W. Baird & Co. Incorporated
Stern Brothers & Co.
Stifel, Nicolaus & Company, Incorporated
The Williams Capital Group, L.P.
US Bancorp Investments, Inc.

2. FINANCIAL ADVISORS

Frasca & Associates, LLC
Hilltop Securities Inc.
Public Financial Management, Inc.
Public Resources Advisory Group, Inc.

Exhibit B

ESD Pre-qualified Legal Counsel

Adopted by ESD on February 16, 2017

Adopted by Brooklyn Arena Local Development Corporation on April 10, 2018

ATTACHMENT A
ESD Pre-Qualified Counsel List
Adopted February 16, 2017

PRACTICE AREA	FIRM NAME	* M/WBE CERTIFIED	MAIN NY OFFICE	ADDITIONAL NY OFFICES
		† M/WBE CERT PENDING		
		** SDOB CERTIFIED		
ENVIRONMENTAL	Akerman LLP		New York	
	Barclay Damon LLP		Buffalo	
	Bond, Schoeneck & King, PLLC		Syracuse	Albany, Buffalo, Garden City, Ithaca, New York, Oswego, Rochester, Utica
	Bryan Cave LLP		New York	
	Buchanan Ingersoll & Rooney PC		Buffalo	New York
	Carter Ledyard & Milburn LLP		New York	
	Greenberg Traurig, LLP		New York	
	Harris Beach PLLC		Rochester	Albany, Buffalo, Ithaca, Melville, New York, Saratoga Springs, Syracuse, Uniondale, White Plains
	Hodgson Russ LLP		Buffalo	Albany, New York, Saratoga Springs
	Holland & Knight LLP		New York	
	Kavinoky Cook LLP		Buffalo	
	Knauf Shaw LLP		Rochester	
	Nixon Peabody LLP		New York	Buffalo, Rochester
	Phillips Lytle LLP		Buffalo	Albany, Garden City, Jamestown, New York, Rochester
	Rupp Baase Pfalzgraf Cunningham LLC		Buffalo	Jamestown, Lockport, Rochester
	Sive, Paget & Riesel PC		New York	
	Towne, Ryan & Partners, PC	*	Albany	Burnt Hills, Cobleskill, Poughkeepsie, Saratoga Springs
	Venable LLP		New York	
	Whiteman Osterman & Hanna LLP		Albany	Hudson
FORECLOSURE	Bryan Cave LLP		New York	
	Buchanan Ingersoll & Rooney PC		Buffalo	New York
	Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP		Uniondale	
	Harris Beach PLLC		Rochester	Albany, Buffalo, Ithaca, Melville, New York, Saratoga Springs, Syracuse, Uniondale, White Plains
	Law Offices of Barry D. Lites LLP	*	Huntington	New York
	Law Offices of Donald J. Tobias		New York	
	McNamee, Lochner, Titus & Williams, PC		Albany	Saratoga County
	Menter, Rudin & Trivelpiece, PC		Syracuse	Watertown
	Nixon Peabody LLP		New York	Buffalo, Rochester
	Phillips Lytle LLP		New York	Albany, Garden City, Jamestown, New York, Rochester
	Towne, Ryan & Partners, PC	*	Albany	Burnt Hills, Cobleskill, Poughkeepsie, Saratoga Springs

* M/WBE CERTIFIED † M/WBE CERT PENDING ** SDVOB CERTIFIED				
PRACTICE AREA	FIRM NAME		MAIN NY OFFICE	ADDITIONAL NY OFFICES
INVESTMENTS	Bryant Rabbino LLP	*	New York	
	Buchanan Ingersoll & Rooney PC		Buffalo	New York
	Burgher Gray Jaffe LLP	*	New York	
	Carter Ledyard & Milburn LLP		New York	
	Colón & Peguero and Herrick Feinstein LLP	*	New York	
	Dentons US LLP		New York	
	Drohan Lee	*	New York	
	Harris Beach PLLC and McGlashan Law Firm, PC	*	Rochester	Albany, Buffalo, Ithaca, Melville, New York, Saratoga Springs, Syracuse, Uniondale, White Plains
	Hodgson Russ LLP		Buffalo	Albany, New York, Saratoga Springs
	Holland & Knight LLP		New York	
	Law Offices of Barry D. Lites LLP	*	Huntington	New York
	Lewis & Munday PC and Buckley King	*	New York	
	Lippes Mathias Wexler Friedman LLP		Buffalo	Albany, New York
	Love & Long, LLP	*	New York	
	McNamee, Lochner, Titus & Williams, PC		Albany	Saratoga County
	Miller Mayer, LLP		Ithaca	
	Mintz Levin Cohen Ferris Glovsky and Popeo PC		New York	
	Nixon Peabody LLP		New York	Buffalo, Rochester
	Peter Papagianakis Business Law Firm		New York	
	Schoeman Updike & Kaufman LLP	*	New York	
	Silverman Shin Byrne & Gilchrest PLLC	*	New York	
	The Nelson Law Firm, LLC		White Plains	
Venable LLP		New York		

PRACTICE AREA	FIRM NAME	* M/WBE CERTIFIED † M/WBE CERT PENDING ** SDOVB CERTIFIED	MAIN NY OFFICE	ADDITIONAL NY OFFICES
REAL ESTATE & LAND USE	Alisa Lukasiewicz PLLC	†	Buffalo	
	Barclay Damon LLP		Buffalo	
	Bond, Schoeneck & King, PLLC		Syracuse	Albany, Buffalo, Garden City, Ithaca, New York, Oswego, Rochester, Utica
	Bryan Cave LLP		New York	
	Bryant Rabbino LLP	*	New York	
	Buchanan Ingersoll & Rooney PC		Buffalo	New York
	Carter Ledyard & Milburn LLP		New York	
	Divitta Alexander PLLC	*	Buffalo	
	Drohan Lee LLP	*	New York	
	Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP		Uniondale	
	Goulston & Storrs		New York	
	Hardwick Law Firm, LLC	*	New York	
	Harris Beach PLLC		Rochester	Albany, Buffalo, Ithaca, Melville, New York, Saratoga Springs, Syracuse, Uniondale, White Plains
	Hawkins Delafield & Wood LLP		New York	
	Herrick Feinstein LLP		New York	
	Hodgson Russ LLP and Law Offices of Sandra Rivera, PLLC	*	Buffalo	Albany, New York, Saratoga Springs
	Holland & Knight LLP		New York	
	Ingram Yuzek Gainen Caroll & Bertolotti LLP		New York	
	Kavinoky Cook LLP		Buffalo	
	Knauf Shaw LLP		Rochester	
	Law Offices of Barry D. Lites LLP	*	Huntington	New York
	Law Offices of Donald J. Tobias		New York	
	Love & Long, LLP	*	New York	
	Menter, Rudin & Trivelpiece, PC		Syracuse	Watertown
	Mintz Levin Cohen Ferris Glovsky and Popeo PC		New York	
	Nixon Peabody LLP		New York	Buffalo, Rochester
	Pannone Lopes Devereaux & West LLC		Albany	Uniondale, White Plains
	Phillips Lytle LLP		Buffalo	Albany, Garden City, Jamestown, New York, Rochester
	Rozario & Associates, PC	†	New York	
	Rupp Baase Pfalzgraf Cunningham LLC		Buffalo	Jamestown, Lockport, Rochester
	Saunders Kahler, LLP	*	Utica	
	Schiff Hardin LLP		New York	
	Schoeman Updike & Kaufman LLP	*	New York	
	Shearman & Sterling LLP		New York	
	Sive, Paget & Riesel PC		New York	
	Skadden, Arps, Slate, Meagher & Flom LLP		New York	
	Towne, Ryan & Partners, PC	*	Albany	Burnt Hills, Cobleskill, Poughkeepsie, Saratoga Springs
	Venable LLP		New York	
	Whiteman Osterman & Hanna LLP		Albany	Hudson
	Windels Marx Lane & Mittendorf, LLP		New York	

PRACTICE AREA	FIRM NAME	* M/WBE CERTIFIED † M/WBE CERT PENDING ** SDVOB CERTIFIED	MAIN NY OFFICE	ADDITIONAL NY OFFICES
REGULATORY LITIGATION	Alisa Lukasiewicz PLLC	†	Buffalo	
				Albany, Buffalo, Garden City, Ithaca, New York, Oswego, Rochester, Utica
	Bond, Schoeneck & King, PLLC		Syracuse	
	Bryan Cave LLP		New York	
	Carter Ledyard & Milburn LLP		New York	
				Albany, Garden City, New York, Rochester, Syracuse, White Plains
	Goldberg Segalla		Buffalo	
				Albany, Buffalo, Ithaca, Melville, New York, Saratoga Springs, Syracuse, Uniondale, White Plains
	Harris Beach PLLC		Rochester	
	Hodgson Russ LLP and Law Offices of Sandra Rivera, PLLC	*	Buffalo	Albany, New York, Saratoga Springs
	Hoguet Newman Regal & Kenney, LLP	*	New York	
	Kavinoky Cook LLP		Buffalo	
	Law Offices of Donald J. Tobias		New York	
	McNamee, Lochner, Titus & Williams, PC		Albany	Saratoga County
	Nixon Peabody LLP		New York	Buffalo, Rochester
	Pannone Lopes Devereaux & West LLC		Albany	Uniondale, White Plains
				Albany, Garden City, Jamestown, New York, Rochester
	Phillips Lytle LLP		Buffalo	
				Jamestown, Lockport, Rochester
	Rupp Baase Pfalzgraf Cunningham LLC		Buffalo	
	Sive, Paget & Riesel PC		New York	
	Towne, Ryan & Partners, PC	*	Albany	Burnt Hills, Cobleskill, Poughkeepsie, Saratoga Springs
	Venable LLP		New York	
Whiteman Osterman & Hanna LLP		Albany	Hudson	

PRACTICE AREA	FIRM NAME	* M/WBE CERTIFIED	MAIN NY OFFICE	ADDITIONAL NY OFFICES
		† M/WBE CERT PENDING		
		** SDVOB CERTIFIED		
TAXATION	Bond, Schoeneck & King, PLLC		Syracuse	Albany, Buffalo, Garden City, Ithaca, New York, Oswego, Rochester, Utica
	Carter Ledyard & Milburn LLP		New York	
	Harris Beach, PLLC		Rochester	Albany, Buffalo, Ithaca, Melville, New York, Saratoga Springs, Syracuse, Uniondale, White Plains
	Hodgson Russ LLP and Law Offices of Sandra Rivera, PLLC	*	Buffalo	Albany, New York, Saratoga Springs
	Mintz Levin Cohen Ferris Glovsky and Popeo PC		New York	
	Nixon Peabody LLP		New York	Buffalo, Rochester
	Norton Rose Fulbright US LLP		New York	
	Pearlman & Miranda LLC	*	New York	
	Phillips Lytle LLP		Buffalo	Albany, Garden City, Jamestown, New York, Rochester
	Whiteman Osterman & Hanna LLP		Albany	Hudson
	Winston & Strawn LLP		New York	

Item I. E.



FOR CONSIDERATION

April 10, 2018

TO: The Directors

FROM: Howard A. Zemsky

SUBJECT: BROOKLYN ARENA LOCAL DEVELOPMENT CORPORATION – Amended Corporation Conflict of Interest and Related Party Transaction Policy and Amendments to the By-Laws in Accordance with Amendments to the New York Not-For-Profit Corporation Law

REQUEST FOR: Approval of an Amended Conflicts Policy and Approval of Amendments to the By-Laws and Related Actions

I. BACKGROUND

The Brooklyn Arena Local Development Corporation (the “Corporation”) is a corporation as defined in subparagraph (a) (5) of Section 102 of the New York Not-For-Profit Corporation Law (“NYPCL”) and is a charitable not-for-profit corporation as defined under Section 201 (b) of the NYPCL and Section 1411 of the NYPCL.

The Corporation was formed to finance certain components of a redevelopment project in the Atlantic Yards area of Brooklyn, New York, including the design, development, construction and operation of an arena for use by a professional basketball team and for other sports and arena events. In accordance with such authority, the Corporation has issued both bonds and refunding bonds to finance the construction of the Arena at Barclays Center.

Certain statutory sections of the NYPCL have been amended on separate occasions necessitating the changes to the By-Laws and the Corporation Conflicts of Interest and Related Party Transaction Policy (“Conflicts Policy”) proposed below.

II. PROPOSED AMENDMENTS

The Conflicts Policy will be amended to: (i) revise the definition of Related Party Transactions to permit certain de minimus or beneficial transactions; (ii) change the defined term Key Employees to Key Persons and expand the scope of Key Persons to include persons other than employees of the Corporation; and (iii) revise the definition of Relatives to include

domestic partners, in compliance with the NYNPCL including but not limited to Sections 102 (22), (24), and (25).

Article III Section 4(c) of the By-Laws will be amended to include a section that prohibits Directors who are employees of the Corporation from participating in any Board of Directors or committee deliberations or voting relating to administration of the Whistleblower Policy, in compliance with the NYNPCL including but not limited to Section 715-b(b)(3).

Article V Section 2(b) of the By-Laws will be amended to remove the requirement to create an Audit and Finance Committee, in compliance with the NYNPCL including but not limited to Section 712-a.

Article VI Section 2 of the By-Laws will be amended to authorize employees of the Corporation to serve a chairperson of the board of directors of the Corporation, in compliance with the NYNPCL including but not limited to Section 713(f).

Article XII of the By-Laws will be amended to remove the definition of Interested Directors and replace said definition with a reference to the Conflicts Policy, as amended, in compliance with the NYNPCL including but not limited to the requirements set forth in sections 715 and 715-a.

III. REQUESTED ACTION

The Board of Directors is now being asked to approve the amended Conflicts of Interest and Related Party Transaction Policy attached hereto and to approve the amended By-Laws attached hereto.

IV. ENVIRONMENTAL REVIEW

Staff has determined that the proposed authorization constitutes a Type II action as defined by the New York State Environmental Quality Review Act and the implementing regulations for the New York Department of Environmental Conservation. No further environmental review is required in connection with this authorization.

V. ATTACHMENTS

Resolution

Exhibit A: Amended Conflict of Interest and Related Party Transaction Policy

Exhibit B: Questionnaire Concerning Conflicts of Interest

Exhibit C: Amended By Laws

April 10, 2018

BROOKLYN ARENA LOCAL DEVELOPMENT CORPORATION – Adoption of an Amended Corporation Conflict of Interest and Related Party Transaction Policy (“Conflicts Policy”) and Approval of Amendments to the By-Laws (“By-Laws”) in Accordance with Amendments to the New York Not-For-Profit Corporation Law (“NYPCL”)

WHEREAS, several sections of the NYPCL have been amended necessitating amendments to the Conflicts Policy and the By-Laws of the Brooklyn Arena Local Development Corporation (the “Corporation”);

WHEREAS, an amended Conflicts Policy has been prepared to comply with the statutory amendments; and

WHEREAS, amendments to the By-Laws have been prepared to comply with the statutory amendments.

RESOLVED, that on the basis of the materials presented to this meeting, a copy of which is hereby ordered to be filed with the records of the Corporation, that the Conflicts Policy, in the form attached hereto, be, and it hereby is, in all respects ratified, confirmed and approved; and that said amended Conflict of Interest and Related Party Transaction Policy be, and it hereby is, adopted by the Corporation.

RESOLVED, that the By-Laws in the form attached hereto, be, and it hereby are, in all respects ratified, confirmed and approved; and that said amended By-Laws of the Brooklyn Arena Local Development Corporation be, and it hereby is, adopted by the Corporation.

RESOLVED, that the “proper officers,” as used herein, shall mean and include the Chairperson of the Board, the Chief Executive Officer, President, the Chief Financial Officer, the Secretary, the Assistant Secretary, the General Counsel, the Treasurer and the Deputy General Counsel of the Corporation, or any of them.

RESOLVED, that any and all actions taken by the proper officers of the Corporation, in connection with and in furtherance of the matters referred to in any of the foregoing resolutions be, and they hereby are, ratified, confirmed, approved and adopted in all respects.

RESOLVED, that the proper officers of the Corporation be, and each of them hereby is, authorized, empowered and directed to take all such further actions and to execute, deliver, certify and file all such further agreements, undertakings, certificates, instruments and documents, in the name and on behalf of the Corporation, under its corporate seal or otherwise, and to pay all such costs, fees and expenses as such officers shall approve as necessary or advisable to carry out the intent and accomplish the purpose of the foregoing resolutions and the transactions contemplated thereby, the taking of such actions and the

execution, delivery, certification and filing of such documents to be conclusive evidence of such approval.

* * *

EXHIBIT A

BROOKLYN ARENA LOCAL DEVELOPMENT CORPORATION

CONFLICT OF INTEREST AND RELATED PARTY TRANSACTION POLICY

AS AMENDED

The board of directors (the “Board”) of Brooklyn Arena Local Development Corporation, a New York not-for-profit corporation (the “Corporation”), has adopted this Conflict of Interest and Related Party Transaction Policy (the “Policy”), as amended, dated April 10, 2018, to ensure that its directors, officers and Key Persons (if any) act in the Corporation’s best interest and comply with applicable legal requirements, including but not limited to the requirements set forth in sections 715 and 715-a of the New York Not-for-Profit Corporation Law.

All directors, officers and Key Persons owe a duty of loyalty to the Corporation and must act in good faith in the Corporation’s best interests, rather than the interests of another entity or person and must comply with all legal requirements, including this Policy.

Directors, officers and Key Persons shall not engage in any transaction or arrangement or undertake positions with other corporations or other organizations that involve a conflict of interest, or the appearance of a conflict, except in compliance with this Policy.

1. Definitions.

(a) “Affiliate” means any entity controlled by, in control of, or under common control with the Corporation.

(b) “Conflict of Interest” means: (i) a particular transaction or arrangement in which any Related Party, has, or in the near future will have, directly or indirectly, a financial interest and in which the Corporation or any Affiliate of the Corporation is a participant; or (ii) or any other interest, financial or otherwise, direct or indirect, that is in substantial conflict with the proper discharge of the duties of the director, officer or Key Person to the Corporation. Examples of circumstances that may give rise to conflicts of interest are set forth below but these examples are not exhaustive. Conflicts might arise in other circumstances or through other relationships. It shall be the continuing responsibility of each director, officer or Key Person to scrutinize his or her transactions, outside businesses and personal relationships for potential conflicts and Related Party Transactions and to immediately report the same to the Board.

Examples of potential conflicts of interest include, but are not limited to:

- (i) A compensation arrangement with an entity or individual with which the Corporation has entered into a transaction or arrangement, or with which the Corporation is negotiating, or contemplating negotiating, a transaction or arrangement;

- (ii) Subject to *de minimus* exception, any ownership or investment interest in, or other affiliation with, any entity or individual that has any transaction, arrangement or relationship with the Corporation, or with which the Corporation is negotiating, or contemplating negotiating, a transaction or arrangement;
- (iii) Acceptance of any gift, entertainment, or other favor where such acceptance might create the appearance of influence on the director, officer, Key Person or Related Party (other than gifts of nominal value, which are clearly tokens of respect and friendship unrelated to any particular transaction);
- (iv) Acquisition of any real property, leaseholds, patents or other property or rights by the director, officer, Key Person or Related Party in which the Corporation has, or the director, officer, Key Person or Related Party knows or has reason to believe at the time of acquisition that the Corporation is likely to have an interest;
- (v) Incurrence of indebtedness to the Corporation, other than advances for amounts due for ordinary travel and expense advances;
- (vi) Use of his or her position, or confidential information or the assets of the Corporation, to his or her personal advantage or for an improper or illegal purpose;
- (vii) The existence of any other interest that may make it difficult for the director, officer, Key Person or Related Party to exercise objective judgment or otherwise perform effectively; or
- (viii) The purchase or sale of securities issued by the Corporation or the utilization of material non-public information by the director, officer, Key Person or Related Party in a manner that would constitute either a violation of federal securities law or otherwise give rise to a Conflict of Interest or the appearance of a Conflict of Interest.

(c) “Key Person” means any person, other than a director or officer, whether or not an employee of the corporation, who (i) has responsibilities, or exercises powers or influence over the corporation as a whole similar to the responsibilities, powers, or influence of directors and officers; (ii) manages the corporation, or a segment of the corporation that represents a substantial portion of the activities, assets, income or expenses of the corporation; or (iii) alone or with others controls or determines a substantial portion of the corporation's capital expenditures or operating budget.

(d) “Related Party” means (i) any director, officer or Key Person of the Corporation or any Affiliate of the Corporation; (ii) any Relative of any director, officer or Key Person of the Corporation or any Affiliate of the Corporation; or (iii) any entity in which any individual described in (i) and (ii) above has a 35% or greater interest or, in the case of a partnership or

professional corporation, a direct or indirect ownership interest in excess of 5%.

(e) “Related Party Transaction” means any transaction, agreement or any other arrangement in which a Related Party has a financial interest and in which the Corporation or any Affiliate of the Corporation is a participant except that a transaction shall not be a related party transaction if: (i) the transaction or the related party's financial interest in the transaction is de minimis, (ii) the transaction would not customarily be reviewed by the board or boards of similar organizations in the ordinary course of business and is available to others on the same or similar terms, or (iii) the transaction constitutes a benefit provided to a related party solely as a member of a class of the beneficiaries that the corporation intends to benefit as part of the accomplishment of its mission which benefit is available to all similarly situated members of the same class on the same terms.

(f) “Relative” means a "Relative" of an individual means (i) his or her spouse or domestic partner as defined in section twenty-nine hundred ninety-four-a of the public health law; (ii) his or her ancestors, brothers and sisters (whether whole or half blood), children (whether natural or adopted), grandchildren, great-grandchildren; or (iii) the spouse or domestic partner of his or her brothers, sisters, children, grandchildren, and great-grandchildren.

2. Disclosure of Conflict.

At any time, any director, officer, Key Person or any Related Party identifies a possible Conflict of Interest, a Conflict of Interest or an interest in a Related Party Transaction, the director, officer or Key Person shall disclose in good faith to the Board the material facts concerning such interest.

3. Resolution.

(a) Any director, officer, Key Person or any Related Party having a potential Conflict of Interest or an interest in a Related Party Transaction shall not (i) be present at or participate in Board or committee deliberation or vote on the matter giving rise to such conflict or transaction (except that the Board may request that such director, officer, key employee or any related party present relevant information at a Board meeting prior to commencement of deliberations or voting thereon), or (ii) attempt to influence improperly the deliberation or voting on the matter giving rise to such conflict or transaction.

(b) With respect to any Related Party Transaction in which a Related Party has a substantial financial interest¹, the Corporation may enter into a transaction or arrangement only if: (i) the Board has considered alternative transactions to the extent available; (ii) at a duly held meeting of the Board, a majority of those Board members who have no interest in the transaction or arrangement approve the transaction or arrangement after determining, in good

¹ The New York Not-for-Profit Corporation Law does not define the term "financial interest" or "substantial financial interest." In determining whether a financial interest rises to the level of a "substantial financial interest," the General Counsel will consider the facts on a case-by-case basis.

faith and after reasonable inquiry, that the transaction is fair and reasonable to the Corporation and in its best interests; and (iii) the Board documents in writing the basis for the decision including its consideration of alternative transactions, if any.

(c) The existence and resolution of a potential Conflict of Interest shall be documented in the Corporation's records, including in the minutes of any meeting at which the conflict was discussed or voted upon.

4. Compliance.

(a) Each director, prior to his or her initial election and annually thereafter, shall complete and sign a written statement (the "Questionnaire") identifying, to the best of the director's knowledge, any entity of which such director is an officer, director, trustee, member, owner (either as a sole proprietor or a partner), or employee and with which the Corporation has a relationship, and any transaction in which the Corporation is a participant and in which the director might have a conflicting interest. The Questionnaire shall be submitted to the secretary of the Corporation (the "Secretary"). The Secretary shall provide a copy of each completed Questionnaire, and any updates, to the General Counsel, who will evaluate the disclosures to determine whether they involve a Conflict of Interest.

(b) Each officer and Key Person shall complete and sign an annual written statement (the "Acknowledgement") acknowledging that such officer or Key Person has received, read and understood the Conflict of Interest and Related Party Transactions Policy of the Corporation and agree that such officer or Key Person has and will continue to abide by such Policy. The Secretary shall maintain a copy of each completed Acknowledgement and any updates.

(c) If the Board has reasonable cause to believe that a director, officer or Key Employee has failed to comply with this Policy, the Board may make such further investigation as may be warranted in the circumstances and if the Board determines that the director, officer or Key Person has in fact failed to comply with this Policy, it shall take appropriate action in accordance with law and the Corporation's certificate of incorporation and bylaws, which may include removal from office.

(d) No Director, officer, or Key Person may solicit or accept any gift from any entity or lobbyist that has a matter before the Corporation, or who will likely have a matter before the Corporation without express approval from the General Counsel. The definition of "gift" includes but is not limited to money, objects, services, loans, travel, lodging, meals, refreshments, entertainment, and event/party invitation, worth \$15 or more.

(e) No Director, officer, or Key Person, or firm or association of which the Director, officer or Key Person is a part, or corporation, 10 percent or more of the stock of which is owned or controlled directly or indirectly by such Director, shall sell any goods or services having a value in excess of \$25 to the Corporation, or any Affiliate of the Corporation, unless such goods or services are provided pursuant to an award or contract let after public notice and

competitive bidding.

(f) Directors, officers, and Key Persons are prohibited from discussing possible future employment which any entity that has had a specific matter pending before them unless 30 days or more has passed since the matter closed. Directors should recuse themselves from all matters related to entities with which they are engaged in employment negotiations.

(g) This Policy shall not supersede any requirement which may be applicable to any director, officer or Key Person by virtue of such individual's status as a state officer or employees as defined in section 73 of the Public Officers Law.

EXHIBIT B

**Questionnaire Concerning Conflicts of Interest and Affirmation
re: Conflict of Interest and Related Party Transactions Policy**

BROOKLYN ARENA LOCAL DEVELOPMENT CORPORATION

To be Completed by Directors and Director Nominees on an Annual Basis

1. Please list any entity of which you serve as an officer, director, trustee, member, owner (either as sole proprietor or a partner), or employee.
2. Please identify any transaction in which the Corporation is a participant and in which you may have a conflicting interest.

The answers to the foregoing questions are stated to the best of my knowledge and belief. I also acknowledge that I have received, read and understood the attached Conflict of Interest and Related Party Transactions Policy of the Corporation and agree that I have and will continue to abide by such Policy.

Date

Name:

Affirmation re: Conflict of Interest and Related Party Transactions Policy

To be Completed by Officers and Key Persons on an Annual Basis

I acknowledge that I have received, read and understood the attached Conflict of Interest and Related Party Transactions Policy of the Corporation and agree that I have and will continue to abide by such Policy.

Date

Name:

EXHIBIT C
BY-LAWS
of
BROOKLYN ARENA LOCAL DEVELOPMENT CORPORATION

ARTICLE I

The Corporation

Section 1. Name.

The name of this corporation is "Brooklyn Arena Local Development Corporation." It shall hereinafter be referred to throughout these By-Laws as the "Corporation".

Section 2. Purpose; Powers.

The Corporation is not formed for pecuniary profit or financial gain. The Corporation is formed to finance certain components of a redevelopment project in the Atlantic Yards area of Brooklyn, New York (the "Atlantic Yards Redevelopment Project"), including the design, development, construction and operation of an arena for use by a professional basketball team and for other sports and arena events (the "Arena") and, if deemed beneficial to the overall Atlantic Yards Redevelopment Project, the infrastructure and land related to such project, all for the public objective of removing blight, relieving and reducing unemployment, promoting and providing for additional and maximum employment, bettering and maintaining job opportunities, and lessening the burdens of government of the State of New York and the New York Job Development Authority ("JDA"). It will undertake its public purpose by issuing federally tax-exempt and/or taxable bonds (the "Bonds"); by issuing such other non-federally tax-exempt obligations as may be appropriate (the "Obligations"); and by exercising all or any part of such public functions and doing any work related to or in connection with the issuance of the Bonds or Obligations, and engaging in all other lawful business purposes, which may, but not necessarily include, entering into one or more ground leases with the New York State Urban Development Corporation d/b/a Empire State Development Corporation ("UDC") as owner of the real property on which the Arena and its related improvements will be situated; and entering into a lease agreement with Brooklyn Arena LLC or its affiliate pursuant to which the Corporation will cause the Arena and its related improvements to be constructed and leased to said developer for a specified term. The Corporation shall have all powers conferred upon a not-for-profit corporation by the New York Not-for-Profit Corporation Law (the "NYPCL").

Section 3. Certificate of Incorporation.

These By-Laws, the powers of the Corporation and its directors, and all matters concerning the conduct and regulation of the business of the Corporation shall be subject to the provisions of the Corporation's certificate of incorporation (the "Certificate of Incorporation") adopted and filed with the Secretary of the State of New York, as the same may be amended from time to time.

ARTICLE II

Location of Offices of Corporation

The principal office of the Corporation shall be located in the City, County and State of New York.

ARTICLE III

Members and Board of Directors

Section 1. Enumeration.

(a) The Corporation shall have a membership body of two members which shall be divided into two classes, the Class A Member and the Class B Member (the Class A Member and the Class B Member are collectively referred to as the "Members"). Each of said classes shall represent one unit of membership interests in the Corporation. The Corporation shall not issue any additional membership interests, or any options, warrant or other securities exercisable therefor or convertible thereinto, except as may be approved by a unanimous vote of all of the Members.

(b) The Class A Member of the Corporation shall be the Governor of the State of New York, and the Class B Member of the Corporation shall be the JDA. Any purported assignment, transfer, mortgage, pledge or hypothecation by any Member of its membership interests in the Corporation without the prior written consent of all other Members shall be void ab initio.

(c) The Corporation shall have a board of directors (the "Board of Directors") which shall be elected by the Members as set forth in Section 3 of this Article III. The Board of Directors shall initially be comprised of six directors (the "Directors") or such other number of Directors as may be approved by a unanimous vote of all of the Members. Each Director shall be entitled to one vote on each matter submitted to the Board of Directors.

Section 2. Terms of Directors.

The Directors shall be classified, with respect to the time for which they severally hold office, into three categories (each category to include one Director elected by the Class A Member and one Director elected by the Class B Member): one category to be originally elected for a term expiring at the annual meeting of Members to be held in 2009, another category to be originally elected for a term expiring at the annual meeting of Members to be held in 2010, and another category to be originally elected for a term expiring at the annual meeting of Members to be held in 2011, with each category to hold office until its successor is duly elected and qualified. At each succeeding annual meeting of the Members, Directors elected to succeed those Directors whose terms then expire shall be elected for a term of office to expire at the fifth succeeding annual meeting of the Members after their election, with each Director to hold office until such person's successor shall have been duly elected and qualified.

Section 3. Election of Directors.

(a) Three members of the Board of Directors shall be elected and appointed by the

Class A Member voting as a single class.

(b) Three members of the Board of Directors shall be elected and appointed by the Class B Member voting as a single class.

(c) Each election of Directors shall be pursuant to the Certificate of Incorporation, these By-Laws and applicable law. The election of Directors need not be by written ballot.

Section 4. Powers of the Members and the Board of Directors.

(a) The Members shall have and may exercise all powers, rights and privileges afforded to "members" of a Corporation organized under the NYNPCL, including without limitation, the power to adopt By-Laws providing for the indemnification of Directors, officers, employees and other agents of the Corporation or of persons who serve other organizations in such capacities at the request of the Corporation, and the power to amend the Certificate of Incorporation of the Corporation.

(b) The Board of Directors shall manage and control the affairs and property of the Corporation and may exercise on behalf of the Corporation all lawful powers of the Corporation under the NYNPCL. If a quorum is present, as set forth in Section 4 of Article IV of these By- Laws, a majority of the Directors present must give their approval to take any actions authorized by the Certificate of Incorporation, these By-Laws or law except to the extent that a larger number is required by law or the Certificate of Incorporation, these By-Laws or law. The Board of Directors shall choose and appoint all the agents and officers of the Corporation and shall determine the compensation, if any, of such agents and officers and such fees, if any, for themselves as they deem reasonable. The Directors shall be reimbursed for all expenses reasonably incurred by them in the performance of their duties. The Board of Directors may, from time to time, to the extent permitted by law, delegate any of its powers to committees, officers, boards of advisors, attorneys or agents of the Corporation, subject to such limitations as the Board of Directors may impose.

(c) Directors who are employees of the Corporation may not participate in any Board of Directors or committee deliberations or voting relating to administration of the New York State Urban Development Corporation, doing business as Empire State Development Whistleblower Policy adopted on August 8, 2016.

Section 5. Special Approval Rights of the Board of Directors.

The affirmative vote of a majority of the Board of Directors, including at least two Directors elected by the Class A Member and at least two Directors elected by the Class B Member, shall be necessary for the transaction of the following specified items of business:

(a) Election of the Corporation's Chairperson, Vice Chairperson (if any), President and Vice President;

(b) Adoption of the Corporation's annual budget and amendments or revisions thereto;

(c) Dissolution, liquidation, termination or winding-up of the Corporation;

(d) (i) Consent to the institution of bankruptcy or insolvency proceedings against

the Corporation, (ii) the filing of a petition seeking or consent to reorganization or relief under any applicable federal or state law relating to bankruptcy or insolvency, (iii) consent to the appointment of a receiver, liquidator, assignee, trustee, sequestrator or other similar official for the Corporation or a substantial part of its property, (iv) the making of a general assignment for the benefit of creditors, or (v) admission in writing of the Corporation's inability to pay its debts generally as they become due; or

(e) Merger or consolidation of the Corporation with any other entity, or the sale of all or substantially all of the Corporation's assets or the acquisition by the Corporation of all or substantially all of the assets or capital stock or other ownership interest of or in any other entity.

ARTICLE IV

Meetings of the Board of Directors and the Members

Section 1. Place.

(a) The annual meeting of the Members for the election of Directors, and for the transaction of such other business as may properly come before the meeting, shall be held at such place, date and hour as shall be fixed by the Board of Directors and designated in the notice thereof, except that no annual meeting need be held if all actions, including the election of Directors, required by the NYNPCL to be taken at the Members' annual meeting are taken by written consent in lieu of meeting pursuant to Section 5 of this Article IV.

(b) Meetings of the Board of Directors shall be held at such place within the State of New York as may be named in the notice of such meeting. Regular meetings may be held in such place and at such times as the Directors may fix by vote.

Section 2. Special Meetings.

(a) Special meetings of the Members for any authorized purpose or purposes may be called by the Board of Directors, the Chairperson, the President or any Member of the Corporation, to be held at such place, date and hour as shall be designated in the notice.

(b) Special meetings of the Board of Directors for any authorized purpose or purposes may be called by any Director, the Chairperson or the President.

(c) At any special meeting of the Members or the Board of Directors, the person calling such special meeting shall have the right to put any matter to a vote of the Members or the Directors, as the case may be, at such special meeting, regardless of whether such person is authorized to vote on such matter.

Section 3. Notice.

(a) Upon the calling of a special meeting of the Members, pursuant to Section 2 of this Article IV, a written notice of the date, place, time and purposes of the meeting shall be given by the Chairperson or the President (or in both of their absences or refusal by any Member) at least 10 days before the meeting to each Member by leaving such notice with the Member or at the Member's residence or usual place of business, or by mailing it, by first-class mail with postage prepaid, to the address of the Member as it appears in the records of the Corporation. Any Member may waive notice

of any meeting either before or after such meeting and attendance at any meeting for which notice was not properly served shall constitute a waiver of such notice.

(b) Upon the calling of a special meeting of the Board of Directors pursuant to Section 2 of this Article IV, a notice of the date, place, time and purposes of the meeting shall be given by the Chairperson or the President (or in both of their absences or refusal by any Director) at least 3 days before the meeting to each Director by telephone or by leaving a written notice with the Director or at the Director's residence or usual place of business, or by mailing a written notice, by first-class mail with postage prepaid, to the address of the Director as it appears in the records of the Corporation. Any Director may waive notice of any meeting either before or after such meeting and attendance at any meeting for which notice was not properly served shall constitute a waiver of such notice.

Section 4. Quorum.

(a) At each meeting of the Members, both the Class A Member and the Class B Member must be present, in person or represented by proxy, to constitute a quorum for the transaction of business. Any authorized action to be taken at such meeting must be approved by both the Class A Member and the Class B Member.

(b) At each meeting of the Board of Directors, a majority of the Directors who have not vacated their directorships by resignation, death or removal and who are otherwise entitled to vote at such meeting, including at least one Director elected by the Class A Member and at least one Director elected by the Class B Member, shall constitute a quorum at any meeting of Directors; a smaller number may adjourn finally or from time to time without further notice until a quorum is secured. If a quorum is present, a majority of the Directors present, including at least one Director elected by the Class A Member and at least one Director elected by the Class B Member, must give their approval to take any actions authorized by the Certificate of Incorporation, these By-Laws or law, except to the extent that a larger number is required by the Certificate of Incorporation, these By-Laws or law. Each Director shall have one vote, and there shall be no voting by proxy.

Section 5. Action by Consent.

(a) Subject to applicable law, any action required or permitted to be taken at any meeting of the Members may be taken without a meeting if both Members (or their respective proxies) consent to the action in writing and the written consents are filed with the records of the meetings of the Members. Such consents shall be treated for all purposes as a vote at a meeting.

(b) Subject to applicable law, any action required or permitted to be taken at any meeting of the Board of Directors or of any committee designated by the Directors thereby, as the case may be, may be taken without a meeting if all the Directors or committee members consent to the action in writing and the written consents are filed with the records of the meetings of the Directors or of the committee. Such consents shall be treated for all purposes as a vote at a meeting.

Section 6. Telephonic Meetings.

(a) Subject to applicable law, the Members may participate in a meeting of the Members by means of a conference telephone call or through use of similar communications equipment which allows all persons participating in the meeting to hear each other at the same time. Participation by such means shall constitute presence in person at a meeting.

(b) Subject to applicable law, the Directors of the Corporation or the members of any committee designated thereby, as the case may be, may participate in a meeting of the Board of Directors or of such committee by means of a conference telephone call or through use of similar communications equipment which allows all persons participating in the meeting to hear each other at the same time. Participation by such means shall constitute presence in person at a meeting.

ARTICLE V

Committees of the Board of Directors and Advisory Board

Section 1. Committee Composition.

The Board of Directors, by resolution adopted by the Board of Directors, may establish and appoint standing committees. The creation of an executive committee must be approved by the Board of Directors. Each committee so appointed, to the extent provided in the resolution establishing it and subject to these By-Laws, shall have all the authority of the Board of Directors.

ARTICLE VI

Officers and Chairperson

Section 1. Executive Officers.

The executive officers of the Corporation shall be a President, Vice President, Treasurer and Secretary, each of whom shall be elected by the Board of Directors. The Board of Directors may elect or appoint such other officers (including one or more Assistant Treasurers and Assistant Secretaries) as it may deem necessary or desirable. Each officer shall hold office for such term as may be prescribed by the Board of Directors from time to time. Any person may hold at one time two or more offices.

Section 2. Chairperson; Vice Chairperson.

The Chairperson of the Board of Directors shall be elected by the Board of Directors. The Board of Directors may also elect a Vice Chairperson. The Chairperson and the Vice Chairperson (if any) shall serve a one-year term. The Chairperson shall preside at all meetings of the Board of Directors, except that the Vice Chairperson (if one is elected) shall preside at all meetings at which the Chairperson is not present. The Chairperson and Vice Chairperson (if any) shall have such other powers and perform such other duties as may be prescribed from time to time by the Board of Directors, including, without limitation, determining the order of business and all matters of procedure at meetings of the Board of Directors.

No employee of the corporation shall serve as Chairperson of the Board of Directors or hold any other title with similar responsibilities, unless the Board of Directors approves such employee serving as Chairperson of the Board of Directors by a two-thirds vote of the entire Board of Directors and contemporaneously documents in writing the basis for the Board of Directors.

Section 3. Powers and Duties.

The President shall be the chief executive officer of the Corporation. In the absence of the President, a Vice President appointed by a majority of the Board of Directors, shall perform all the duties

of the President. Subject to the Board of Directors, the officers and agents of the Corporation shall each have such powers and authority and shall perform such duties in the management of the business, property and affairs of the Corporation as generally pertain to their respective offices, as well as such powers and authorities and such duties as from time to time may be prescribed by the Board of Directors.

ARTICLE VII

Removals, Resignations and Vacancies

Section 1. Removal of Officers.

The Board of Directors, by a unanimous vote, at any meeting called for such purpose may remove from office, with or without cause, any officer of the Corporation.

Section 2. Removal of Directors.

Each Member may remove from office, with or without cause, any Director of the Corporation elected by such Member, upon written notice to the other Member and the Board of Directors.

Section 3. Resignations.

Any Director or officer may resign by filing with the President or the Chairperson or with the Board of Directors a written resignation, which shall take effect on being so filed or at such other time as may be specified therein.

Section 4. Vacancies.

(a) Upon any vacancy in the Board of Directors caused by the death, resignation or removal of a Director elected by a Member, such Member shall appoint a Director to fill such vacancy, and any Director so chosen shall hold office until the next annual meeting of the Members and until his or her successor is duly elected and qualified or his or her earlier death, incapacity, resignation or removal from office in accordance with these By-Laws or applicable law or pursuant to an order of a court of competent jurisdiction.

(b) Any vacancy resulting from any increase in the authorized number of Directors shall be filled in accordance with the unanimous vote of the Members, and any Director chosen in accordance therewith shall hold office until the next annual meeting of the Members and until his or her successor is duly elected and qualified or his or her earlier death, incapacity, resignation or removal from office in accordance with the By-Laws or applicable law or pursuant to an order of a court of competent jurisdiction.

ARTICLE VIII

Seal

The corporate seal shall be circular in form with the name of the Corporation around the periphery and the year and the state of incorporation within. Said seal may be facsimile, engraved or printed.

ARTICLE IX

Fiscal Year

The fiscal year of the Corporation shall end on March 31

ARTICLE X

Amendment

These By-Laws may be altered, amended or repealed, in whole or in part, by a majority of the Board of Directors, including at least two Directors elected by the Class A Member and at least two Directors elected by the Class B Member, except Article VII, which may only be amended upon a unanimous vote of all of the Members.

ARTICLE XI

Indemnification

The Corporation shall indemnify each Member, each Director and each officer and, to the extent authorized by the Board of Directors, each other person authorized to act for or on behalf of the Corporation, to the full extent to which indemnification is permitted under the NYNPCL.

ARTICLE XII

Interested Directors

A Conflict of Interest and Related Party Transaction Policy (annexed as Exhibit A) has been adopted to ensure that its directors, officers and key persons act in the Corporation's best interest and comply with legal requirements, including but not limited to the requirements set forth in the NYNPCL.

ARTICLE XIII

Statutes

This Corporation has been caused to be created by the JDA under and pursuant to the NYNPCL.

The Corporation shall not be a subsidiary or agent of the JDA under the laws of the State of New York.

ARTICLE XIV

Dissolution

The Corporation may be dissolved only by a unanimous vote of the Members of the Corporation in the manner provided by the NYNPCL; provided, however, the Members shall take no action to dissolve, liquidate or wind-up the Corporation until a date after which all original or refunding qualified Bonds and any and all other Obligations issued by the Corporation are retired.

Adopted as of April 10, 2018

Item II. A.



FOR CONSIDERATION

April 10, 2018

TO: The Directors

FROM: Howard A. Zemsky

SUBJECT: BROOKLYN ARENA LOCAL DEVELOPMENT CORPORATION - Amendment to Lease between Brooklyn Arena Local Development Corporation and Brooklyn Events Center, LLC

REQUEST FOR: Board Authorization to Enter into a Second Amendment to Agreement of Arena Lease

I. INTRODUCTION

The Board of the Brooklyn Arena Local Development Corporation ("BALDCO" or the "Corporation") is being asked to approve the execution of a second amendment to the Agreement of Arena Lease to expand the types of operating and capital expenditures that may be paid with funds available in the landlord's operating and maintenance account ("O&M Fund"). The tenant, Brooklyn Events Center, LLC, a Delaware limited liability company ("ArenaCo"), operates the arena located in the Atlantic Yards area of Brooklyn, New York, now known as the Arena at Barclays Center (the "Arena"), and has requested that the Corporation approve the Second Amendment to the Agreement of Arena Lease, providing for the payment of some additional categories of expenditures.¹

II. BACKGROUND

The Corporation is a corporation as defined in subparagraph (a)(5) of Section 102 of the New York Not-For-Profit Corporation Law ("NYPCL") and is a charitable not-for-profit corporation as defined under Section 201 (b) of the NYPCL and Section 1411 of the NYPCL.

The Corporation was formed in 2009 to finance certain components of a redevelopment project in the Atlantic Yards area of Brooklyn, New York (the "Atlantic Yards Redevelopment Project"). The redevelopment project included the design, development, construction and

¹ In October 2017, Mikhail Prokhorov, the 100% owner of the Nets and ArenaCo, announced his intention to sell a minority stake in the Nets. As part of the sale process, the NBA has required that the Arena and the Nets amend the Nets License Agreement to reallocate a portion of revenue from the Arena to the Team. The proposed amendment to the Original Lease (as defined below) will facilitate this revenue reallocation.

operation of the Arena for use by a professional basketball team and for other sports and arena events and, if deemed beneficial to the overall Atlantic Yards Redevelopment Project, the infrastructure and land related to such project, all in furtherance of its statutory public objectives. It undertakes its public purpose by issuing federally tax-exempt and/or taxable bonds. Construction of the Arena was completed in 2012 and the Arena is currently being used as the home venue of the Brooklyn Nets and New York Islanders and as a venue for cultural, sporting and civic events and other entertainment.

A. The Bonds

In 2009, the Corporation, as issuer (the "Issuer"), issued \$510,999,996.50 of PILOT Revenue Bonds, Series 2009 (the "Series 2009 PILOT Bonds"). The Series 2009 PILOT Bonds were issued primarily for the purpose of providing a portion of the costs of acquisition, design, development, and construction of the Arena and certain other improvements related to the Arena.

In 2016, the Issuer refinanced a portion of its Series 2009 PILOT Bonds with its PILOT Revenue Refunding Bonds, Series 2016A and PILOT Revenue Refunding Bonds, Series 2016B (Federally Taxable), which are collectively the "Series 2016 PILOT Bonds". All the remaining Series 2009 PILOT Bonds and the Series 2016 PILOT Bonds are the "PILOT Bonds". This partial Series 2009 PILOT Bond refunding has resulted in a greater amount of funds available in the O&M Fund, after all bond debt service requirements have been satisfied.

The PILOT Bonds are special limited obligations of the Issuer, payable primarily out of revenues of the Issuer derived from certain payments in lieu of ad valorem real property taxes ("PILOTs") made under a Payment-in-Lieu-of-Tax Agreement, dated as of May 12, 2010 (the "PILOT Agreement") among the Issuer, ArenaCo, as tenant of the Arena, New York City (the "City") and Empire State Development ("ESD").

The PILOTS are transferred to The Bank of New York Mellon, in its capacity as the PILOT Trustee under a PILOT Assignment and Escrow Agreement, dated as of May 12, 2010 and are applied to first pay debt service on the Bonds and then to fund the O&M Fund to pay for the Landlord O&M Costs (as defined below) pursuant to the terms of the PILOT Assignment, the Ground Lease and the Original Lease (as defined below).

B. The Lease and Lease Amendment.

The Arena was leased to ArenaCo, pursuant to an Agreement of Arena Lease dated May 12, 2010 (as amended by the First Amendment dated August 3, 2011, the "Original Lease") between the Corporation and ArenaCo. Under the terms of the Original Lease, the Corporation, as landlord, agrees to pay for certain operating expenses of the Arena, specifically, the costs of operating, maintaining and repairing the heating, ventilation, air conditioning, utility and energy systems of the Arena, and the costs of certain insurance ("Landlord O&M Costs") from,

funds are available in the O&M Fund. ArenaCo, as tenant, agrees to pay all the remaining operating expenses and capital improvements relating to the Arena.

In the prior fiscal year, ArenaCo generated insufficient operating revenues to cover the operating expenses of the Arena. As a result of the 2016 PILOT Bond refinancing, additional funds are anticipated to be available for deposit in the O&M Fund. ArenaCo has requested that the Corporation amend the Original Lease pursuant to the terms of a Second Amendment to the Agreement of Arena Lease to include in Landlord O&M Costs certain additional operating costs, including cleaning and janitorial services, trash collection and disposal, utilities, insurance, graffiti removal and Arena-related maintenance and repair costs. The inclusion of these additional Landlord O&M Costs is consistent with the leases for other sports facilities financed in the same manner as the Arena. This will allow the Tenant to use the additional funds available in the O&M Fund for more types of operating costs than those contemplated in the Original Lease. The Landlord's obligation to pay Landlord O&M Costs shall continue to be limited to the amount available for disbursement from the O&M Fund and ArenaCo will remain responsible for all O&M costs to the extent they are not covered by the O&M Fund.

As described above, PILOTs transferred to the PILOT Trustee under a PILOT Assignment and Escrow Agreement are applied first to pay debt service on the Bonds, therefore there will be no interruption or diminution in funds available to pay such debt service as a result of the proposed amendment. Additionally, the Landlord's obligations to pay such additional operating expenses under the amendment are expressly limited to the amount on deposit in the O&M Fund. Therefore BALDCO will only be obligated to pay for any operating expenses up to the balance of funds available in the O&M Fund, which represents PILOTs in excess of debt service.

III. REQUESTED ACTIONS

In accordance with the attached resolution, you are hereby requested to: (1) approve the terms and authorize the execution and delivery of the Second Amendment to the Agreement of Arena Lease; and (2) authorize certain officers and employees of the Corporation to take all actions deemed necessary to effect the entry of the Second Amendment to the Agreement of Arena Lease.

IV. ATTACHMENTS

Resolutions

Exhibit A - Second Amendment to Agreement of Arena Lease

April 10, 2018

BROOKLYN ARENA LOCAL DEVELOPMENT CORPORATION – Amendment to Lease
between Brooklyn Area Local Development Corporation and Brooklyn Events Center,
LLC – Board Authorization to Enter into a Second Amendment to Agreement of Arena
Lease

WHEREAS, the Corporation issued its PILOT Revenue Bonds (Barclays Center Project), Series 2009 (the “Series 2009 PILOT Bonds”), its PILOT Revenue Refunding Bonds (Barclays Center Project), Series 2016A (the “Series 2016A PILOT Bonds”) and its PILOT Revenue Bonds (Barclays Center Project), Series 2016B (Federally Taxable) (the “Series 2016B PILOT Bonds” and together with the Series 2009 PILOT Bonds and the Series 2016A PILOT Bonds, the “PILOT Bonds” to finance and refinance the design, development, construction and operation of an arena in the Atlantic Terminal area of Brooklyn, New York (“Arena”); and

WHEREAS, the Corporation entered into an Agreement of Arena Lease dated May 12, 2010 (the “Original Lease”) between the Corporation and Brooklyn Events Center, LLC (“ArenaCo”), pursuant to which ArenaCo has operated the Arena since 2012 as the home venue of the Brooklyn Nets and New York Islanders and as a venue for other entertainment, cultural, sporting and civic events; and

WHEREAS, under the terms of the Original Lease, the Corporation, as landlord, agrees to pay for certain operating expenses of the Arena, specifically, the costs of operating, maintaining and repairing the heating, ventilation, air conditioning, utility and energy systems of the Arena, and the costs of certain insurance (“Landlord O&M Costs”) from, and to the extent, funds are available in the O&M Fund and ArenaCo, as tenant, agrees to pay all the remaining operating expenses and capital improvements relating to the Arena.

WHEREAS, in the prior fiscal year, ArenaCo has generated insufficient operating revenues to cover operating expenses of the Arena, and has requested that the Corporation amend the Original Lease pursuant to the terms of a Second Amendment to the Agreement of Arena Lease to include in Landlord O&M Costs certain additional operating costs, such as cleaning and janitor services, trash collection and disposal, utilities, insurance, graffiti removal and Arena-related maintenance and repair costs. The Landlord’s obligation to pay Landlord O&M Costs shall continue to be limited to the amount available for disbursement from the O&M Fund.

WHEREAS, Corporation deems it advisable to authorize the execution and delivery of the Second Amendment to the Agreement of Arena Lease, and to authorize certain other matters related thereto.

NOW, therefore, the Board of Directors of the Corporation, in accordance with the materials presented at this meeting, including the Board Memorandum and the Exhibit

annexed to this Resolution (collectively, the "Materials"), upon motion duly made and seconded, duly adopts the following Resolution:

RESOLVED, that copies of the Materials are hereby ordered to be filed with the records of the Corporation and are deemed to be incorporated herein by reference; and further

RESOLVED, that the Second Amendment to the Agreement of Arena Lease, in substantially the form presented to this meeting, is hereby approved, and any Authorized Officer (as hereinafter defined) is hereby authorized and directed to execute and deliver the same on behalf of the Corporation, in such form as is approved with such changes, supplements and amendments thereto as any Authorized Officer executing the same may approve, such approval to be conclusively evidenced by such Authorized Officer's execution thereof; and further

RESOLVED, that each of the Chairperson, President, Vice President, Chief Financial Officer and Treasurer of the Corporation, and any other person duly authorized to act in such capacity, is designated an "Authorized Officer," and further

RESOLVED, that each of the Authorized Officers is hereby authorized and directed to approve and execute the Second Amendment to the Agreement of Arena Lease and all other related documents as he or she may reasonably deem necessary, desirable or appropriate to consummate the transactions authorized hereby and thereby, and take such other actions in the name of the Corporation and on its behalf, as he or she may reasonably deem necessary, desirable or appropriate to carry out the foregoing resolutions, and that all actions heretofore taken by any Authorized Officer or his or her designee are hereby ratified and approved.

* * *

EXHIBIT A

Second Amendment to Agreement of Arena Lease

SECOND AMENDMENT TO AGREEMENT OF ARENA LEASE

This SECOND AMENDMENT TO AGREEMENT OF ARENA LEASE (this “**Amendment**”) is made as of the ____ day of April, 2018, by and between BROOKLYN ARENA LOCAL DEVELOPMENT CORPORATION, a local development corporation formed under Article 14 of the New York Not-for-Profit Corporation Law having an office at c/o New York State Urban Development Corporation (d/b/a Empire State Development Corporation), 633 Third Avenue, New York, New York 10017, as landlord (together with its successors and assigns, “**Landlord**”), and BROOKLYN EVENTS CENTER, LLC, a Delaware limited liability company having an office at 15 MetroTech Center North, Brooklyn, New York 11201, as tenant (together with its permitted successors and assigns, “**Tenant**”).

WITNESSETH:

WHEREAS, Landlord and Tenant entered into that certain Agreement of Arena Lease, dated May 12, 2010, as amended by that certain First Amendment to Agreement of Arena Lease, dated August 3, 2011 (collectively, the “**Original Lease**”), pursuant to which Landlord leased to Tenant certain premises located in the Atlantic Terminal area of the Borough of Brooklyn, City and State of New York, on which Tenant has constructed the Arena, which Tenant maintains and operates in accordance with the terms and conditions thereof; and

WHEREAS, the operating expenses of the Arena have increased from projections and the operating revenues of the Tenant were insufficient to cover operating expenses in the prior fiscal year;

WHEREAS, the Tenant is requesting that the Landlord agree to cover additional operating expenses of the Arena as part of the “Landlord O&M Costs” to offset a portion of such additional expenses;

WHEREAS, Landlord has agreed to cover such additional “Landlord O&M Costs” to the extent of funds available in the “O&M Fund;”

WHEREAS, the Landlord and Tenant desire to amend the Original Lease on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby covenant and agree as follows:

1. All capitalized terms used but not otherwise defined herein shall have the meanings ascribed thereto in the Original Lease. All references to “this Lease” contained in the Original Lease shall mean the Original Lease as modified by this Amendment.
2. The Original Lease is hereby amended by deleting Section 9.5(a) in its entirety and inserting the following in lieu thereof:

*“O&M Fund. Provided that (i) no Event of Default shall have occurred and be continuing under this Lease, (ii) ESDC shall have made available to Landlord the Landlord O&M Costs, as provided for in Section 3.3 of the Ground Lease, and (iii) funds have been paid to Tenant, as agent of Landlord, from the “O&M Fund” (as defined in and pursuant to the PILOT Assignment and the Bond Documents) and such funds have not been theretofore allocated by Tenant, as agent of Landlord, to pay other Landlord O&M Costs or Landlord Allowance (as provided in this Section), and subject to the limitations of **Section 9.5(c)** and **Section 9.5(f)** below, Landlord shall pay for the costs of operating, maintaining and repairing the Arena incurred pursuant to **Sections 9.1(a), 9.3, 10.1(a)-(d)** of this Lease (the “**Landlord O&M Costs**”). All such costs shall be paid by Tenant, as agent of Landlord, either from (A) the funds transferred from the O&M Fund or (B) funds of Tenant and thereafter reimbursed to Tenant from funds, if any, subsequently paid to Tenant as agent of Landlord from the O&M Fund. In the event the cost of such operation, maintenance and repair exceeds the amount of the Landlord O&M Costs actually and indefeasibly received from ESDC, then Tenant shall be entirely responsible for such excess costs.”.*

3. All costs and expenses associated with preparing, executing and delivering this Amendment shall be paid by Tenant, including without limitation, an agreed upon fee to the Landlord.

4. Each of Landlord and Tenant represents and warrants to the other that it has not dealt with any broker, finder or other party entitled to a broker's or finder's fee, or other commissions or compensation arising out of or in connection with the execution of this Amendment or any transactions relating thereto. Tenant shall be liable for, and shall indemnify Landlord against, all brokerage commissions or other compensation due to any broker, finder or other party caused by a breach of the foregoing representation. This Section 4 shall survive the expiration or earlier termination of the Original Lease, as amended by this Amendment.

5. Nothing contained herein is intended to be for, or to inure to, the benefit of any Person other than Landlord, Tenant, Recognized Mortgagees, the City and their respective successors and assigns.

6. Landlord enters into this Amendment in Landlord's "proprietary" capacity only. Except to the extent of the Overridden Provisions and the tax exemptions permitted by the Original Lease, as amended by this Amendment (and any mortgage recording tax exemption), nothing in this Amendment shall be deemed in any way to expand, restrict, burden, or waive any right, privilege, obligation, claim or immunity that any Governmental Authority would possess, be subject to, or be entitled to exercise if the lessor under this Amendment were a private party. Without limiting the effect of the immediately preceding sentence, nothing in this Amendment is intended to burden or restrict the exercise by any Governmental Authority of its "police power" or impose any liability upon any Governmental Authority for (or entitle Tenant to any credit, offset, defense, claim or counterclaim on account of) the exercise of such "police

power". In keeping therewith, Tenant's relations with all Governmental Authorities, when acting in their capacity as Governmental Authorities, shall be governed by otherwise applicable law.

7. The Original Lease, as amended by this Amendment, is hereby ratified and confirmed in all respects and remains in full force and effect.

8. Tenant hereby acknowledges and agrees that, as of the date hereof, (i) it has obtained all consents, waivers, approvals and authorizations required in connection with the full execution and delivery of this Amendment, including, without limitation, the consent of each Recognized Mortgagee and the National Basketball Association, (ii) the Original Lease has not been amended or modified (except as set forth herein) and the Original Lease, as amended by this Amendment, remains in full force and effect, and (iii) neither Tenant nor Landlord is in default of its obligations under the Original Lease and Tenant is obligated to comply with all of the terms thereof and currently has no defense thereto.

9. Each party shall execute and deliver such further documents, and perform such further acts, as may be reasonably necessary to achieve the parties' intent in entering into this Amendment.

10. This Amendment shall be governed by and construed and enforced in accordance with the laws of the State of New York, without regard to choice of law rules and without the reference to any rule, custom or canon requiring construction against the draftsman.

11. This Amendment may be executed in any number of counterparts (whether original, facsimile, electronic mail or portable document format), each of which when executed and delivered shall be deemed to be an original and all such counterparts together shall constitute one and the same instrument.

[Signatures on the following page]

IN WITNESS WHEREOF, the parties hereto have duly executed this Amendment as of the day and year first above written.

LANDLORD:

BROOKLYN ARENA LOCAL
DEVELOPMENT CORPORATION,
a local development corporation formed
under Article 14 of the New York Not-for-
Profit Corporations Law

By: _____
Name:
Title:

TENANT:

BROOKLYN EVENTS CENTER, LLC, a
Delaware limited liability company

By: _____
Name:
Title:

IN WITNESS WHEREOF, the parties hereto have duly executed this Amendment as of the day and year first above written.

LANDLORD:

BROOKLYN ARENA LOCAL
DEVELOPMENT CORPORATION,
a local development corporation formed
under Article 14 of the New York Not-for-
Profit Corporations Law

By: _____
Name:
Title:

TENANT:

BROOKLYN EVENTS CENTER, LLC, a
Delaware limited liability company

By: _____
Name:
Title:

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Item II. B.



FOR CONSIDERATION

April 10, 2018

TO: The Directors

FROM: Howard A. Zemsky

SUBJECT: BROOKLYN ARENA LOCAL DEVELOPMENT CORPORATION – Procurement of Legal Services – Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

REQUEST FOR: Authorization to Accept an Assignment of a Contract to Provide Legal Services in Connection with Granting Consent to an Amendment to the Lease of the Arena at Barclays Center in Brooklyn, NY and to Take Related Actions

I. CONTRACT SUMMARY

Counsel: Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. (“Counsel” or “Mintz”)

Scope of Services: Counsel would serve as co-bond and real estate counsel to provide legal services to the Brooklyn Arena Local Development Corporation (“BALDC”) in connection with granting consent to an amendment of the lease of the Arena at Barclays Center.

Contract Amount: All Counsel fees for the transaction, including any co-counsel’s fee and all affiliated eligible Costs of the lease amendment or related bond transaction, shall not exceed \$90,000. Counsel will be required to subcontract, and use good faith efforts to achieve an allocation of 30% of total billings on this matter, to co-bond and real estate counsel, the Hardwick Law Firm, LLC.

Funding Source: The contract is expected to be funded in its entirety by the Brooklyn Events Center, LLC (the “Developer”). Counsel will agree that BALDC and the New York Transportation Development Corporation (“TDC”) will not be obligated to pay any amounts for services described herein except to the extent funded by the Developer.

II. BACKGROUND

On December 23, 2009, BALDC issued approximately \$511,000,000 of bonds (the "Initial Bonds") to finance a portion of the costs, and related Initial Bond costs, of a project consisting of the design, development, acquisition, construction and equipping of the now completed arena at Barclay's Center (the "Arena") in the Atlantic Terminal area of Brooklyn, NY, being used as the home venue of the NBA's Brooklyn Nets basketball team (the "Nets" or the "Team") and as a venue for other entertainment, cultural, sporting and live events. The Initial Bonds were financed by payments in lieu of taxes pursuant to ESD's ownership of the Arena, ESD's lease of the Arena to BALDC and a further lease (the "Lease") by BALDC to the Developer. Additional refunding bonds, (collectively with the Initial Bonds, the "Arena Bonds") were issued in 2016.

In October 2017, Mikhail Prokhorov, 100% owner of the Nets and the Arena, announced his intention to sell a minority stake in the Nets. As part of the sale process, the NBA has required that the Arena and Team amend the Nets License Agreement to reallocate a portion of revenue from the Arena to the Team, which will require an amendment to the Lease (the "Amendment Transaction").

Pursuant to a Notice to Proceed ("NTP") issued by the TDC, Counsel has commenced providing legal services to issue the Bonds. Counsel agreed in the NTP that any contract for services, such as the NTP, would be deemed assigned to BALDC. Counsel also agreed to then did enter into a retainer, along with related procurement documents (collectively the "Retainer"), with TDC for all services and obligations described herein. The retainer was capped, along with all other issuer counsel fees and affiliated costs of the transaction, at \$90,000.

As detailed below, today BALDC has adopted a Pre-Qualified List of Counsel and can now accept an assignment of the Retainer to provide legal services for the Amendment Transaction.

III. COUNSEL SELECTION PROCESS

On June 27, 2016 the New York State Urban Development Corporation d/b/a Empire State Development ("ESD") staff reached out to multiple law firms, including firms on the existing Pre-Qualified Counsel List and placed an advertisement in the New York State Contract Reporter requesting proposals from law firms to create a new Pre-Qualified Counsel List in the following practice areas (including, in each instance, litigation capabilities): (1) real estate and land use; (2) construction; (3) environmental; (4) condemnation; (5) bankruptcy; (6) taxation; (7) bond financing; (8) foreclosure; (9) employment; (10) transactional direct and indirect investments; and (11) regulatory litigation.

Seventy-eight (78) firms responded to the solicitation. The responses were evaluated by a Review Committee consisting of seven ESD attorneys, including the attorneys responsible for environmental, litigation, contractor and supplier diversity, bond financing, and employment matters and the Deputy General Counsel. ESD's Board of Directors approved this new Pre-

Qualified Counsel List on February 16, 2017 and Counsel is on the new Pre-Qualified Counsel List for bond counsel and related services. Based on ESD's review process, TDC's Directors adopted the new ESD List of pre-qualified counsel and BALDC is approving the same list in separate materials before the BALDC Board of Directors on this date.

It is recommended that Mintz serve as co-bond and real estate counsel for the Amendment Transaction. Selection of Counsel was based on the firm's experience and familiarity with the Arena Bonds financing and the related Leases. More specifically, Mintz was the same firm that represented BALDC as bond counsel on the Arena Bonds in both 2006 and the 2016. Mintz also served as co-bond counsel on the issuance of Liberty Bonds to finance the construction of the Goldman Sachs global headquarters in lower Manhattan. Accordingly staff recommends the retention of Counsel for the Amendment Transaction based on: a) Counsel's specific and necessary expertise as bond counsel, b) Counsel's performance with distinction on the Bonds, (c) Counsel's rate proposal, and (d) the ESD pre-qualification process.

The appointment of Counsel also represents an equitable distribution of work among the rotating slate of Senior and Junior Tier law firms and MWBE firms to handle ESD's, BALDC's and the TDC's debt in terms of size of transaction, fees received, length of time since their last engagement and total number of transactions.

IV. SCOPE OF WORK

Counsel would advise the BALDC in securities, bonds, taxes, real estate and other related matters in connection with the Amendment Transaction. Such work may include, but not be limited to, drafting, negotiating, and finalizing the following types of documents: sale contracts, resolutions, amendments, disclosure documents, amendments to lease agreements and tax opinions.

V. CONTRACT - NEED, PRICE AND FUNDING

A. NEED FOR CONTRACT

In accordance with Federal tax law, an opinion from bond counsel is required to opine upon tax exempt bonds and recommended for the subject Amendment transaction. In addition, bond counsel expertise is necessary to ensure compliance with applicable securities laws and market practices. The Directors are accordingly being requested to authorize accepting the assignment of the Retainer from the TDC.

B. CONTRACT PRICE AND FUNDING

All counsel costs and expenses are expected to be paid by the Developer on or about the closing of the Amendment Transaction. Compensation to Mintz under this authorization shall not exceed \$90,000. Counsel acknowledges that BALDC and TDC will have no obligation to pay any legal fees except to the extent funds are received from the Developer.

VI. RESPONSIBLE PARTY

Pursuant to State Finance Law Section 139-j and 139-k and the Authority's policy related thereto, staff has: (a) considered Counsel's ability to perform the services provided for in the proposed contract; and (b) consulted the list of offerers determined to be non-responsible bidders and debarred offerers maintained by the New York State Office of General Services. Based on the foregoing, staff considers Counsel to be responsible.

VII. ENVIRONMENTAL REVIEW

Staff has determined that the proposed authorization constitutes a Type II action as defined by the New York State Environmental Quality Review Act ("SEQRA") and the implementing regulations for the New York Department of Environmental Conservation. No further environmental review is required in connection with this authorization.

VIII. NON-DISCRIMINATION AND CONTRACTOR & SUPPLIER DIVERSITY

ESD's Non-Discrimination and Contractor & Supplier Diversity policies will apply to this contract. Counsel shall be required to include minorities and women in any job opportunities created, to solicit and utilize MWBE's for any contractual opportunities generated in connection with this procurement, and shall be required to use Good Faith Efforts (pursuant to 5 NYCRR §142.8) to achieve an overall MWBE participation goal of 30% related to the total amount of TDC's legal fees. Mintz will agree that its compensation will be subject to an allocation of 30% of billings and subcontracting to co-bond counsel, the Hardwick Firm.

IX. REQUESTED ACTION

The Directors are asked to authorize the Corporation to accept an assignment of the Retainer to engage Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. as counsel to BALDC for such legal services as are described in these materials.

X. RECOMMENDATION

Based on the foregoing, I recommend approval of the requested action.

XI. ATTACHMENTS

Resolution

Schedule B - Schedule of Maximum Billing Rates and Reimbursement Allowances

April 10, 2018

BROOKLYN ARENA LOCAL DEVELOPMENT CORPORATION ("BALDC") – Authorization to Accept an Assignment of a Contract to Provide Legal Services from Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C. to Provide Legal Services in Connection with Granting Consent to an Amendment to the Lease of the Arena at Barclays Center in Brooklyn, NY and to Take Related Actions

RESOLVED, that in accordance with the materials presented to this meeting, a copy of which is hereby ordered to be filed with the record of the BALDC (the "Materials"), BALDC hereby finds the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. ("Counsel") to be responsible; and be it further

RESOLVED, that the BALDC is hereby authorized to accept the assignment of a contract with Counsel for the purposes and services, and substantially on the terms and conditions, as set forth in the Materials; and be it further

RESOLVED, that the President and his designee(s) be, and each of them hereby is, authorized and directed, in the name and on behalf of the BALDC to execute and deliver any and all documents and to take all such actions as may be necessary or appropriate to effectuate the foregoing. Any actions previously taken by the BALDC or Counsel consistent with this authorization are hereby ratified and affirmed.

* * *

SCHEDULE B

SCHEDULE OF MAXIMUM BILLING RATES AND REIMBURSEMENT ALLOWANCES

	<u>Maximum Rate Structure (per hr.)</u>
Partner/Of Counsel	\$600.00
Senior Associate (At least four years of experience)	\$550.00
Mid-level Associate (Three or four years of experiences)	\$500.00
Junior Associate (Passed the bar exam but less than three years of experience)	\$425.00
Law Clerk (Law student interns or first year associates who have yet to pass the bar exam)	\$325.00
Legal Assistant/Paralegal	\$150.00